

Missouri Attorney General's Opinions - 1980

Opinion	Date	Topic	Summary
1-80	Aug 26		Opinion Letter to The Honorable James F. Antonio
3-80	Apr 3	CITY ATTORNEY. CITY COUNSELOR. CITIES, TOWNS, AND VILLAGES.	For the purposes of §§ 105.300, et seq., RSMo Supp. 1979, providing for social security tax reporting, the city attorney elected pursuant to § 77.370, RSMo 1978, is an employee of a third class city; the city counselor appointed under § 98.340, RSMo 1978, is an employee of a third class city; a special attorney appointed under § 98.340, RSMo 1978, is not an employee of a third class city. The city attorney of a fourth class city under § 79.230, RSMo 1978, is an employee of a fourth class city. Depending upon the legal relationship as defined by ordinance, under § 79.230, RSMo 1978, a special counsel may become an employee of a city as assistant city attorney for social security purposes. A town or village may have an attorney who would be an employee pursuant to § 105.300(2), RSMo Supp. 1979, or may employ a special counsel who would be an independent contractor but the nature of the relationship would depend upon the ordinance and agreement with that particular attorney.
4-80	Jan 25	COMMUNITY MENTAL HEALTH CENTER. MENTAL HEALTH.	1) Tax levy proposals submitted to a county vote for the purpose of establishing or maintaining a community mental health service shall specify the exact amount of the proposed levy. 2) Tax levy proposals may be submitted to a county vote during either a primary or general election. 3) Notice by publication shall be given by the clerk of the governing body in the manner provided for in § 205.979, S.B. 652 79th General Assembly.
7-80	May 7		Opinion Letter to The Honorable James L. Mathewson
9-80	Aug 4	EDUCATION. DEPARTMENT OF MENTAL HEALTH.	Parents of school-aged handicapped or severely handicapped children admitted to the Department of Mental Health may not be charged for special education and related services. If the admissions of any such children is necessary for them to receive appropriate special education and related services, then their parents may not be charged for special education, related services, nonmedical care, and room and board. School districts and special school districts are obliged to pay towards the costs of special education and related services rendered by the Department of Mental Health to its full-time patients or residents. Absent a contractual provision, we find no authority for the

			Department of Mental Health to charge the State Board of Education for special education it chooses to render to patients and residents of its facilities.
10-80	Aug 4	EDUCATION. DEPARTMENT OF MENTAL HEALTH.	Parents of school-aged handicapped or severely handicapped children placed by the Department of Mental Health with community placement providers may not be charged for special education and related services. If the placement of any such children is necessary for them to receive appropriate special education and related service, then their parents may not be charged for special education, related services, nonmedical care, and room and board. School districts and special school districts of domicile are obliged to pay towards the costs of special education and related services rendered by the serving school districts and special school districts. The State Board of Education shall provide special educational services to the severely handicapped children who cannot receive such services from the school districts where the children actually reside.
11-80	June 18	COUNTY COLLECTORS. COMPENSATION.	County collector of Morgan County is entitled to a commission for collecting delinquent and back taxes of two percent on the amount of delinquent or back tax plus interest and penalties, pursuant to § 52.290, RSMo.
12-80	Mar 13	DIVISION OF CORRECTIONS. CRIMINAL LAW.	A defendant sentenced to serve consecutive terms of imprisonment under the new criminal code must have his actual conditional release date computed by adding up the total of his prison terms on his respective consecutive sentences. He should be released on conditional release at the end of that total period of time. The length of his conditional release period is determined by adding the total of the conditional release terms on the respective consecutive sentences.
14-80	July 29	PENSIONS. RETIREMENT. MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM.	The provisions of subsection 15 of § 104.310, RSMo Supp. 1979, relating to the definition of "employee" insofar as the Missouri State Employees' Retirement System laws are concerned and providing that the word "employee" does not include any employee who is currently accumulating benefits under some other retirement or benefit fund to which the state is a contributor is not retroactive but is applicable beginning January 1, 1979. Such provisions allow certain persons to come within the definition of "employee" and to receive membership credit beginning January 1, 1979, if they are not accumulating benefits in another system to which the state is a contributor.
16-80	Feb 29		Opinion Letter to Mr. David R. Freeman
17-80	June 20	SAVINGS AND LOAN.	The Director of the Division of Savings and Loan Supervision may not recognize additional sources of revenue to that division for purposes of the director's computation of just and reasonable per diem charges,

			but these examination charges should approximate in amount the total of the actual per diem charges for all division personnel participating in the examination and other expenses incurred by the division on account of that examination, as specified in subsection 1 of § 369.324.
19-80	July 16		Opinion Letter to Mr. F. M. Wilson
20-80	Apr 21	VETERANS. SOLDIERS AND SAILORS. PUBLIC SCHOOL RETIREMENT SYSTEM.	<p>The opinion of this office is as follows:</p> <p>1. The provisions of subsection 3 of § 169.055 RSMo 1978, relating to the eligibility of a teacher to receive military service credit for military duty in the Armed Forces of the United States of America during an emergency involving national defense have been preempted to the extent that they are in conflict with § 2024 of Chapter 43 of Title 38 of the United States Code Annotated.</p> <p>2. A teacher is eligible to receive military service credit as a member of the Public School Retirement System of Missouri upon meeting all other statutory requirements of § 169.055 RSMo 1978.</p>
22-80	July 24		Opinion Letter to The Honorable Carl Muckler
24-80	Jan 31		Opinion Letter to The Honorable Richard J. Fredrick
25-80	May 14		Opinion Letter to The Honorable Stephen Bradford
26-80	Oct 21	SCHOOLS.	Section 167.241, RSMo Supp. 1979, does not authorize a school board that does not maintain an approved high school offering work through the twelfth grade to designate an unapproved high school for attendance by resident pupils who have completed the work of the highest grade offered in the schools of the district, both by reason of § 167.131, RSMo 1978, and the provisions of § 167.241, RSMo Supp. 1979, requiring the board only to choose from high schools that meet minimum classification standards adopted by the State Board of Education.
28-80	Mar 4		Opinion Letter to The Honorable Edward E. Ottinger
29-80	Feb 14		Opinion Letter to The Honorable Alex J. Fazzino
30-80	Sept 24		Opinion Letter to The Honorable Dotty Doll
	June 27		Opinion Letter to The Honorable Stephen Bradford
32-80			Withdrawn
33-80	Jan 21	COUNTIES. COUNTY JUDGES. MILEAGE.	County court judges of second class counties are not authorized to charge the county mileage for travel from their home to the courthouse for meetings of the court.

34-80	Mar 27		Opinion Letter to The Honorable Flavel J. Butts
35-80	Mar 17		Opinion Letter to The Honorable Flavel J. Butts
36-80	Feb 11		Opinion Letter to The Honorable Harry Hill
37-80	July 28	COUNTY CLERKS.	The \$3.00 fee which the county clerk is authorized to receive for his services pursuant to § 51.410, RSMo Supp. 1979, does not apply where a different statute prescribes the fee which is to be charged and, in the absence of an express statutory provision, does not apply to services rendered by the clerk to the county, other political subdivisions or special districts of the state or to public officers of the state and local governments in the performance of their duties.
38-80	Aug 7		Opinion Letter to The Honorable Russell G. Brockfeld
39-80			Withdrawn
41-80	July 11	MENTAL HEALTH.	A mental health board of trustees established pursuant to §§ 205.975, RSMo, et seq., cannot hold title to real property or issue tax anticipation notes. However, the county courts, as governing bodies of a third class county, can hold title to real property. Such county court can issue tax anticipation notes for mental health boards based upon the anticipated revenues to be derived from a tax levy under § 205.980, RSMo.
42-80	Mar 26		Opinion Letter to Mr. Stephen R. Sharp
43-80	Feb 13		Opinion Letter to The Honorable Dennis K. Hoffert
44-80	May 9		Opinion Letter to The Honorable Phil Barry
45-80	July 9		Opinion Letter to The Honorable Don Randall
46-80	Nov 6	MERIT SYSTEM. PERSONNEL BOARD (DIVISION).	<p>1. Regulations of the Personnel Advisory Board promulgated under § 36. 350, RSMo Supp. 1979, apply to all state agencies, merit and non-merit, except the University of Missouri.</p> <p>2. Dismissal procedures under § 36.390.5, RSMo Supp. 1979, apply to non-merit agencies under § 36.390.7, RSMo Supp. 1979, unless they adopt similar procedures under § 36.390.8, RSMo Supp. 1979, except that such procedures need not apply to employees in policymaking positions, members of the military or law enforcement agencies or employees of academic institutions under § 36.390.8.</p> <p>3. Agencies subject to § 36.390.7 and not excepted therefrom are not prohibited from changing from one procedure to another in the processing of dismissals. Any procedure so established by a non-merit agency does not need to be formulated as a rule under Chapter 536,</p>

			<p>RSMo 1978, unless otherwise required by a statute which is peculiar to that agency.</p> <p>4. Section 36.510, RSMo Supp. 1979, is applicable to all state agencies except the University of Missouri.</p> <p>5. Sections 36.350, 36.390, and 36.510 are not applicable to the legislative or judicial branches or to elective officials of the executive branch or to agencies having a bi-state character.</p>
48-80	Jan 22		Opinion Letter to The Honorable Ed Bushmeyer
49-80	Apr 17		Opinion Letter to The Honorable Harriett Woods
50-80	Jan 15	TAXATION. ASSESSMENT.	Under the provisions of Senate Bill No. 247, 80th General Assembly, county collectors are required to deduct from property tax collections for each taxing authority, except the State, each authority's share of the estimated costs incurred under reassessment plans approved by the State Tax Commission. The first deduction is to be made from taxes due December 31, 1979.
55-80	Nov 10	CARL. DENTISTS. DENTAL BOARD. REORGANIZATION ACT.	Neither the Division of Professional Registration nor the Department of Consumer Affairs, Regulation and Licensing has the authority to employ, prohibit the employment of, discharge, supervise, set the salaries for, or otherwise control statutorily authorized employees of the Missouri Dental Board, including, in particular, investigators or inspectors; except, however, the Division of Professional Registration now possesses the authority to employ, direct and control personnel which provide the clerical and other staff services which relate solely to the issuance and renewal of licenses.
56-80	Feb 4		Opinion Letter to The Honorable Tom R. Williams
58-80			Withdrawn
59-80	Apr 9		Opinion Letter to Mr. Fred A. Lafser
61-80	Mar 12		Opinion Letter to The Honorable Flavel J. Butts
62-80	May 20	LIQUOR.	A temporary caterer's permit may be issued by the Missouri Division of Liquor Control to a qualified applicant under § 311.485, RSMo, even though the premises involved are already licensed to a different licensee under other provisions of the state liquor laws.
63-80	Oct 28	DEPARTMENT OF MENTAL HEALTH.	The Department of Mental Health has the authority to create the "patient's trust fund" by C.C.S.H.B. 1724, Sections 630.305 through 630.315, 80th General Assembly. The Department of Mental Health has the authority to expend funds from the "patient's trust fund" either <u>to provide</u> patients or residents "easy access" to their funds or <u>to spend</u>

			the funds as representative payee or other fiduciary under public or private benefit arrangements. The Department of Mental Health has the authority under Sections 630.305 through 630.315 to administer the “patient's trust fund” without the approval or supervision of any other state agency.
64-80	Jan 9		Opinion Letter to The Honorable C. E. Hamilton, Jr.
65-80	Feb 8		Opinion Letter to The Honorable Philip R. Pruett
66-80	Mar 3		Opinion Letter to The Honorable Leroy Blunt
67-80	Mar 28	LIQUOR.	Missouri statutes prohibit licensed liquor establishments from dispensing liquor during certain hours on the primary election day, the first Tuesday after the first Monday in August of even-numbered years, and the general election day, the first Tuesday after the first Monday in November of even-numbered years.
69-80	Feb 5		Opinion Letter to The Honorable Joe Moseley
71-80	Jan 30		Opinion Letter to Dr. Arthur L. Mallory
73-80	Feb 6		Opinion Letter to The Honorable LeRoy Braungardt
74-80	July 14		Opinion Letter to The Honorable John E. Scott
75-80	Nov 19	SCHOOLS. SCHOOL TRANSPORTATION.	<p>A. A board of education may provide transportation to and from school for pupils who live less than three and one-half miles from school if the parents agree in writing to pay the actual cost of transporting the pupils.</p> <p>B. A board of education may not lease the school buses purchased from school district funds to a PTA council for the purpose of transporting pupils who live less than three and one-half miles from school if the parents agree in writing to pay the actual cost of transporting the pupils.</p>
76-80	Mar 14		Opinion Letter to The Honorable Dale K. Miller
77-80	Mar 19		Opinion Letter to Dr. Arthur L. Mallory
78-80	Dec 31	GAMBLING. CRIMINAL LAW. LAS VEGAS NIGHT.	A “Las Vegas Night” held by a not-for-profit corporation constitutes gambling in violation of the provisions of Chapter 572, RSMo 1978; and that the corporation and its officers may be found in violation of §§ 572.030 or 572.040, RSMo 1978, which prohibit the promotion of gambling.
79-80	Feb 8		Opinion Letter to The Honorable John C. Andrews
80-80	Mar 25		Opinion Letter to The Honorable Gary G. Sprick
81-80			

81-80	July 21		Opinion Letter to The Honorable Gary C. Lentz
82-80	May 21	TAXATION. ASSESSMENT.	With respect to the provisions of subsection 2 of § 137.750, RSMo Supp. 1979, relating to costs of reassessment, that the terms “taxing jurisdiction” and “taxing authority” have essentially the same meaning; in calculating the percentage of reassessment costs, the county collector should include in the formula all ad valorem real and personal property tax collections, including distributable property taxes; if the county collector undercharges a taxing jurisdiction in estimating the costs of reassessment for a particular year, it is proper for him to make a deduction to recover the undercharge in future tax years; and he is to pay the taxing authority what it has due because of overcharges, as provided in such subsection.
83-80	Mar 5		Opinion Letter to Dr. Arthur L. Mallory
84-80	Feb 26		Opinion Letter to The Honorable Richard M. Webster
85-80	Sept 5		Opinion Letter to The Honorable John E. Scott
89-80	Oct 24	SECRETARY OF STATE. NOT FOR PROFIT CORPORATIONS.	A Chapter 355 corporation may be merged into a Chapter 352 corporation, in the manner provided in Section 352.150. Once a judicial determination of lawfulness of the merger between two such corporations has been made, the secretary of state must file the facially valid documents presented to him as required by law.
92-80	Mar 7	MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM.	It is the opinion of this office with respect to the question concerning a loan of funds of the Missouri State Employees' Retirement System to the Chrysler Corporation to be secured by land in the state of Michigan that: 1. Section 379.080 RSMo authorizes a loan by the Retirement System secured by improved unencumbered real estate worth at least two times the amount of the loan; 2. Section 376.300 RSMo, Senate Bill 322, 80th General Assembly authorizes a loan by the Retirement System not exceeding one percent of the system's assets and not more than 75% of the fair market value of the unencumbered real estate; 3. The prudent man rule is applicable to the Board of Trustees of the Retirement System acting under either of the above sections.
93-80			Withdrawn
95-80	June 30	BAIL. SCHOOLS.	A school district is a political subdivision within the meaning of the Missouri Supreme Court Rule 33.17 and, under the provisions of such rule, a local school board member cannot be accepted as a surety on a bail bond.
97-80	Apr 16	CRIMINAL LAW. CRIMINAL PROCEDURE.	If a drug offender, otherwise qualifying for expungement of his conviction under § 195.290, RSMo 1978, receives any disposition of his offense other than judicial probation, he is not entitled to the

			expungement of his conviction under this statute.
98-80	Mar 7		Opinion Letter to The Honorable Harriett Woods
101-80	Sept 15	MENTAL HEALTH.	The Department of Mental Health and its facilities should deposit monetary grants, gifts, donations, devises and bequests to the credit of the Mental Health Trust Fund. State purchasing requirements relating to bids must be complied with unless it is impossible to make such purchases on a bid basis because of the provisions of the donations or bequests or if the property is of a technical nature in which case direct purchases can be authorized.
102-80	Apr 7		Opinion Letter to The Honorable Betty C. Hearnese
103-80	Apr 15		Opinion Letter to The Honorable Al Nilges
105-80	July 17		Opinion Letter to The Honorable Richard M. Webster
107-80	May 13	ELECTIONS. REGISTRATION.	Provisions of § 115.157, RSMo, authorize an election authority having registration information in computerized form to determine whether or not tapes or printouts will be furnished to candidates upon request without charge. If such tapes or printouts are furnished to any candidates upon request and without charge, they must be furnished to all candidates within the jurisdiction of the election authority upon request and without charge.
108-80	Apr 8		Opinion Letter to The Honorable Robert Jackson
109-80	May 22	ELECTIONS. NEWSPAPERS. COUNTY CLERK. PUBLIC NOTICES.	When an election is held in a political subdivision or a special district which is located within the jurisdiction of more than one election authority in situations where the provisions of § 115.023, subsections 3 and 4, are not applicable that the notice of election is to be given by the election authority of the county with the greatest proportion of the political subdivision's or special district's registered voters, and that if two newspapers of different political faith which are qualified under Chapter 493, RSMo, are published within the bounds of the area holding the election, the notice is to be published in such newspapers. If there is only one such newspaper, then the notice shall be published in such newspaper. If there is no newspaper published within the bounds of the election area, then the notice shall be published in two qualified newspapers of different political faith serving the area. The election authority may provide any additional notice of the election it deems desirable.
111-80	Dec 23		Opinion Letter to The Honorable James C. Kirkpatrick
112-80	May 23	COUNTIES. OFFICE OF ADMINISTRATION.	Under the provisions of § 33.095, RSMo, in every county other than a first class charter county, county employees who are paid a mileage allowance or reimbursement will have that allowance or

		MILEAGE. COUNTY JUDGES.	reimbursement computed at the rate of seventeen cents per mile, as set by order of the Commissioner of Administration, unless a higher rate is specifically authorized by statute. The seventeen cent per mile rate will prevail over the ten cent per mile rate provided for county court judges of second class counties under § 49.100, RSMo, although mileage can only be paid for travel authorized by § 49.100. Such a county court does not have authority to pay a mileage allowance to such employees other than the seventeen cents per mile authorized by the Commissioner of Administration or a higher rate, if authorized by a statute. Section 33.095 has no effect on sheriffs' mileage fees which are taxable as court costs.
113-80	June 6		Opinion Letter to Dr. James Frank
116-80	Apr 3		Opinion Letter to The Honorable John Dennis
120-80	Apr 10		Opinion Letter to The Honorable James C. Kirkpatrick
121-80	July 25		Opinion Letter to The Honorable Richard M. Webster
123-80	May 27		Opinion Letter to Dr. Paul R. Ahr
124-80	Sept 9		Opinion Letter to The Honorable Stephen R. Sharp
127-80	Sept 23		Opinion Letter to The Honorable Paul Dietrich
129-80	July 30		Opinion Letter to The Honorable Allan G. Mueller
133-80	May 28		Opinion Letter to The Honorable Charles L. Moore
137-80	July 3		Opinion Letter to The Honorable Thomas J. Brown, III
139-80	Aug 29		Opinion Letter to Dr. Arthur L. Mallory
140-80	Aug 14		Opinion Letter to The Honorable Harriett Woods
141-80	June 11		Opinion Letter to The Honorable Al Nilges
142-80	June 16		Opinion Letter to The Honorable James R. Strong
143-80	June 19		Opinion Letter to The Honorable Estil V. Fretwell
144-80	June 23	PROSECUTING ATTORNEY. ASSISTANT PROSECUTING ATTORNEYS.	Assistant prosecuting attorneys in first class counties not having a charter form of government may be employed on a part-time basis and may be allowed to engage concurrently in private civil law practice.
145-80	July 22	JUDGES.	A magistrate judge who was elected to a full term in November of

		ELECTION.	1978 in Jackson County became an associate circuit judge under the nonpartisan court plan on January 2, 1979, and is entitled to serve a full four-year term beginning January 1, 1979, through December 31, 1982, and therefore does not run for retention in 1980. Associate circuit judges in St. Louis County who were appointed by the governor after the general election in 1978 and before January 2, 1979, to fill additional magistrate positions or to fill a vacancy under repealed §§ 482.010.3 or 482.020 complete the terms for which they were appointed December 31, 1980, and shall run for retention at the general election in 1980 for a term of office ending December 31, 1984. Associate circuit judges who were appointed by the governor after the general election in 1978 and before January 2, 1979, as additional magistrates or to fill a vacancy under repealed §§ 482.010.3 or 482.020, in courts not under the nonpartisan court plan will complete the terms for which they were appointed December 31, 1980, and the persons elected to such offices at the November election in 1980 will serve the remainder of the term of the office ending December 31, 1982.
146-80	Aug 13		Opinion Letter to David R. Freeman
148-80	Oct 29		Opinion Letter to The Honorable James F. Antonio
149-80	June 27		Opinion Letter to The Honorable Joe D. Holt
150-80	Aug 1		Opinion Letter to The Honorable Robert H. House
152-80	Oct 22	STATE FIRE MARSHAL. PUBLIC RECORDS.	Section 320.235, RSMo 1978, permits the State Fire Marshal to release investigatory statements, testimony and reports to the public, provided that such statements, testimony and reports are not required to be kept confidential by any state or federal law.
153-80	Nov 7	ASSESSMENTS. ASSESSORS.	The funds designated by Senate Bill No. 679, § 2, 80th General Assembly, are not in lieu of the twenty-five percent funding for reassessment provided by § 137.750.2(3), RSMo Supp. 1980 , and these funds may be spent for both general reassessment purposes and for ongoing assessment costs. Further, the county court need not approve expenditure of all money collected under Senate Bill No. 679, § 2. Finally, counties under township organization do not come within the provisions of Senate Bill No. 679 so that the present means of funding the costs of the assessment functions in these counties is not changed.
154-80	Nov 17	CRIMINAL LAW. DIVISION OF CORRECTIONS.	Under § 589.040, RSMo Supp. 1980 , the Director of the Division of Corrections is to include, in the rehabilitation program for sexual assault offenders, all inmates who are presently serving sentences for

		PRISONERS.	sexual assault offenses, whether the imprisonment began prior or subsequent to the effective date of § 589.040, RSMo Supp. 1980.
155-80	Aug 12	COUNTY COLLECTORS.	A second class county collector is not entitled to retain any of the fees collected under § 151.280, RSMo.
156-80	July 18	ELECTIONS. CANDIDATES.	A candidate committee formed for a prior election and still in existence is required to make a disclosure report of expenditures and contributions under § 130.041, RSMo, if it has made any expenditures or received any contributions since its last required disclosure report without regard to the amount spent or received unless the treasurer of such committee properly files a notarized statement under oath pursuant to § 130.046, RSMo Supp. 1979, with the appropriate officer stating that neither the aggregate amount of contributions received nor the aggregate amount of expenditures made by the committee during the reporting period exceeded one hundred dollars. A candidate with an existing candidate committee which has made expenditures or received contributions since its last required disclosure report for a previous election is not eligible to file an exemption statement under § 130.016, RSMo Supp. 1979. When neither the candidate nor the candidate committee has received contributions or made expenditures since the last required disclosure report, the candidate is eligible to file an exemption statement under § 130.016, RSMo Supp. 1979. Expenditures made by a candidate committee since its last required disclosure report for a previous election are reportable expenditures for the candidate's next election.
159-80	July 31	CITIES, TOWNS & VILLAGES. CITY COURTS. COURT COSTS.	A municipality coming within the provisions of §§ 590.100 to 590.150, RSMo, may impose a \$2.00 court fee for peace officer training under § 590.140, RSMo, in addition to the maximum court costs provided under § 479.260, RSMo.
162-80	Sept 11		Opinion Letter to The Honorable Gary E. Stevenson
164-80	Sept 5		Opinion Letter to The Honorable Truman E. Wilson
165-80	Aug 11		Opinion Letter to The Honorable Richard M. Webster
166-80	Aug 22	SHERIFFS. COMPENSATION.	Money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special commissioner in partition sales should be paid to the county treasury.
167-80	Aug 22	SHERIFFS. COMPENSATION.	Money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special commissioner in partition sales should be paid to the county treasury.
168-80	Aug 22	SHERIFFS. COMPENSATION.	Money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special

			commissioner in partition sales should be paid to the county treasury.
169-80	Aug 22	SHERIFFS. COMPENSATION.	Money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special commissioner in partition sales should be paid to the county treasury.
171-80	Aug 15	CART. INTEREST. COUNTY FUNDS.	Interest earned by a county on money which the county receives from the County Aid Road Trust Fund should be credited to the county road and bridge fund and not to the county general revenue fund.
173-80	Dec 19	POLICE. ARRESTS. CITY POLICE. DEPUTY SHERIFFS.	Municipal police officers do not have the power to arrest ordinance violators outside the limits of the municipality, except when the officer is in "hot pursuit" of the violator and is an officer of the municipality in a first class county having a charter form of government or is an officer of a constitutional charter city which provides for such an exception, and, furthermore, municipal police officers holding a valid deputy sheriff's commission do not have power to arrest ordinance violators outside the municipal limits.
174-80	July 30		Opinion Letter to Dr. Paul R. Ahr
176-80	Aug 29		Opinion Letter to The Honorable Joe Moseley
177-80	Sept 8	MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM. PENSION. RETIREMENT.	<p>1. A refund of accumulated contributions could be paid to a circuit court clerk who terminates his membership and requests a refund under the provisions of subsection 2 of § 104.350 of House Bill 983 as enacted by the 80th General Assembly.</p> <p>2. A refund of accumulated contributions could be paid to a beneficiary or the estate of a circuit court clerk under the provisions of subsection 3 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly in the event of the death of a circuit court clerk.</p> <p>3. A refund of accumulated contributions could be paid to a circuit court clerk at retirement under the present provisions of subsection 2 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly.</p> <p>4. A refund of accumulated contributions could not be paid to a circuit court clerk prior to retirement under the present provisions of subsection 4 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly and signed into law by the Governor on February 14, 1980.</p>
179-80	Aug 22	ELECTIONS.	(1) Presidential electors are state officers elected to statewide office. Consequently, in order for a new party to meet the statutory requirements of § 115.315, RSMo 1978, and nominate presidential

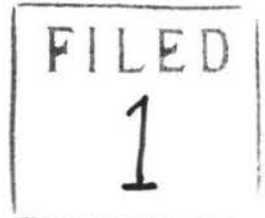
			<p>electors and place its candidate for the United States President before this State's electorate it must meet the signature and petition requirements imposed by § 115.315.4, RSMo 1978.</p> <p>(2) If a new political party submits a petition in which some of its candidates meet the requirements of § 115.315, RSMo 1978, and others do not, those that do are legally entitled to be placed on the ballot.</p> <p>(3) In order for a new political party to place its candidates on the ballot in this State it must give a complete list of the names and addresses, including the street and number, of all candidates to be nominated for office, as specifically called for in § 115.315.2(3), RSMo 1978.</p>
180-80	Oct 30		Opinion Letter to The Honorable Marion G. Cairns
181-80	Oct 27	JUVENILES. DRIVING WHILE INTOXICATED.	A sixteen year old person arrested for violation of a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony, who refuses to submit to a chemical test to determine the alcoholic content of his or her blood, is subject to provisions of § 577.050, RSMo, relating to penalties for failure to submit to such test.
182-80	Sept 2		Opinion Letter to The Honorable Ralph Uthlaut, Jr.
186-80			Withdrawn
187-80	Sept 24		Opinion Letter to The Honorable Marvin E. Proffer
188-80			Withdrawn
189-80	Sept 19		Opinion Letter to The Honorable Meredith Ratcliff
190-80	Oct 31	LIQUOR. ELECTIONS.	It is lawful for a city or municipality to enact an ordinance prohibiting the sale of liquor on days of any special, county, township, city, town or municipal election.
191-80	Nov 13		Opinion Letter to The Honorable Truman E. Wilson
193-80			Withdrawn
196-80	Sept 26		Opinion Letter to The Honorable Edwin L. Dirck
198-80	Sept 25		Opinion Letter to The Honorable Paul Bradshaw
199-80	Sept 22		Opinion Letter to The Honorable James F. Antonio
201-80	Nov 20		Opinion Letter to The Honorable Ralph Hedrick
203-80	Nov 5		Opinion Letter to The Honorable William J. Hannah

204-80	Oct 2		Opinion Letter to The Honorable F. M. Wilson
206-80	Nov 25		Opinion Letter to The Honorable Wayne Goode
207-80	Oct 20		Opinion Letter to The Honorable Melvin Smith
212-80	Nov 12		Opinion Letter to The Honorable Gary G. Sprick
217-80	Oct 23	CIRCUIT JUDGES.	An associate circuit judge of the probate division of the circuit court who was a probate judge on January 2, 1979, does not become a circuit judge of the probate division in a county of the second class which first attains a population of over 65,000 inhabitants under the 1980 official Census.
221-80	Oct 17		Opinion Letter to The Honorable Fred B. Brummel
222-80	Oct 23		Opinion Letter to The Honorable Robert B. Paden
242-80	Dec 16		Opinion Letter to The Honorable William A. Peterson

August 26, 1980

OPINION LETTER NO. 1
(Answer by Letter-Allen)

The Honorable James F. Antonio
State Auditor of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Antonio:

This letter is in response to a request from your office for an opinion concerning the following questions:

1. Can the Missouri Division of Insurance tax Missouri domiciled insurance companies on premiums allocated to states in which such companies are not licensed?
2. Can the Missouri Division of Insurance tax insurance companies not licensed in Missouri on premiums such companies allocate to Missouri?

It seems clear that the mere fact that an insurance company decides to allocate premiums in a certain manner does not determine the question of whether or not such premiums are or are not taxable in Missouri.

In answer to your first question, it is our view that the Missouri Division of Insurance may tax Missouri domiciled insurance companies on premiums improperly allocated to states in which such companies are not licensed.

In answer to your second question, it is our view that the Missouri Division of Insurance may tax insurance companies not licensed in Missouri on premiums such companies properly allocate to Missouri.

The Honorable James F. Antonio

We have not attempted to determine or hypothesize the myriad situations in which such premiums would or would not be taxable. The question of whether or not a premium is taxable in a particular case should be decided by this office only when a precise factual situation is presented to us.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

CITY ATTORNEY:
CITY COUNSELOR:
CITIES, TOWNS, AND VILLAGES:

For the purposes of §§ 105.300, et seq., RSMo Supp. 1979, providing for social security tax reporting, the city attorney elected pursuant to § 77.370, RSMo 1978, is an employee of a third class city; the city counselor appointed under § 98.340, RSMo 1978, is an employee of a third class city; a special attorney appointed under § 98.340, RSMo 1978, is not an employee of a third class city. The city attorney of a fourth class city under § 79.230, RSMo 1978, is an employee of a fourth class city. Depending upon the legal relationship as defined by ordinance, under § 79.230, RSMo 1978, a special counsel may become an employee of a city as assistant city attorney for social security purposes. A town or village may have an attorney who would be an employee pursuant to § 105.300(2), RSMo Supp. 1979, or may employ a special counsel who would be an independent contractor but the nature of the relationship would depend upon the ordinance and agreement with that particular attorney.

April 3, 1980

OPINION NO. 3

Mr. Stephen C. Bradford, Commissioner
Office of Administration
Room 125, State Capitol Building
P. O. Box 809
Jefferson City, Missouri 65102



Dear Commissioner Bradford:

This is in response to your request for an opinion asking the following question:

For the purpose of administering the Social Security Agreement under Section 105.300 to 105.440 is an individual, appointed to the position of City Attorney, an "employee" for social security reporting purposes as defined in Section 105.300 (2) or is such attorney self-employed, whether the method of appointment specifically names the individual or only permits hiring of an attorney.

After reviewing the materials which you forwarded with your request, it appears that a number of city attorneys or attorneys who by ordinance have been hired to represent a city on a contractual basis are questioning whether the city may deduct social security contributions from the salary or fees paid to such attorneys as employees for purposes of the social security provisions

Mr. Stephen C. Bradford

found in § 105.300(2), RSMo Supp. 1979. Section 77.370, RSMo 1978, prescribes that city attorneys in third class cities shall be elective officers. Additionally, under § 98.340, RSMo 1978, third class cities may hire an attorney or attorneys to represent them in any suit or action at law or in equity brought by or against the city except in prosecutions for violations of municipal ordinances. Also under this section, the city may provide for a city counselor whose duties shall be prescribed by ordinance.

In light of these statutes, it is apparent that an elected city attorney is an employee for social security purposes under the definition of employee in § 105.300, RSMo Supp. 1979. It is further apparent that a city counselor under § 98.340, RSMo 1978, is equally a city employee for social security purposes under § 105.300(2), RSMo Supp. 1979. However, when the city council by resolution employs an attorney or attorneys pursuant to § 98.340, RSMo 1978, and pays them a reasonable fee for their service in connection with a suit or action at law or in equity, then it is contemplated that the city maintain an independent contractor relationship with the employed attorney or attorneys. Common law principles would tell us that this relationship is not that of an employer and employee. Therefore, we conclude that, where a city council in a third class city has by proper resolution employed an attorney or attorneys on a fee basis to represent the city in any suit or action at law or in equity brought against the city (except in prosecutions for violations of municipal ordinances) under § 98.340, RSMo 1978, those attorneys are not employees for the purposes of § 105.300(2), RSMo Supp. 1979.

We now turn to fourth class cities. Under § 79.230, RSMo 1978, the mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have the power to appoint a city attorney. It is clear that the appointed officer falls within the scope of the definition of employee under § 105.300(2), RSMo Supp. 1979, just as city attorneys in third class cities are treated as employees for social security purposes. It should be noted that in § 79.230, RSMo 1978, there is a reference to the employment of "special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor." This is done by ordinance. If the ordinance is drafted in such a manner as to make said special counsel an assistant city attorney on a regular basis as opposed to an independent contractor on a case by case basis, such as found in § 98.340, RSMo 1978, as applied to third class cities, then that assistant city attorney would constitute an employee of the city. However, if the employment of special counsel is done on a fee basis to represent the fourth class city in any suit or action at law or in equity on a case by case basis, then it appears that the special

Mr. Stephen C. Bradford

counsel would not be within the purview of § 105.300(2), RSMo Supp. 1979, which is the definition of employee of a political entity for social security purposes.

With regard to towns and villages, as described in Chapter 80, RSMo 1978, pursuant to § 80.240, RSMo 1978, the board of trustees has the power to appoint "such other officers, servants and agents as may be necessary, remove them from office, prescribe their duties and fix their compensation." Quite appropriately, the board could appoint a town or village attorney who would have all the characteristics of an employee for social security purposes. The nature of the relationship would be set out in the ordinance approving the employment of the attorney and including, perhaps, the agreement which would be approved also by the board of trustees. As with attorneys who represent third and fourth class cities, if the relationship is such that an attorney is hired to represent the town and village as the town attorney or village attorney and not as an independent contractor, such as in the case where special counsel is employed for a fee to represent a fourth class city in any suit or action at law or in equity on a case by case basis, then it would appear that such attorney would be an employee of the town or village for the purposes of § 105.300(2), RSMo Supp. 1979. While the authority is not as specific in the statutes pertaining to towns and villages, it is clearly implied from the powers and duties of the trustees under § 80.090, RSMo 1978, and from the powers of the trustees to make appointments under § 80.240, RSMo 1978, that the board of trustees of towns or villages has the authority to either have an attorney who would be an employee for social security purposes or an independent contractor on a case by case basis. Each individual contract and ordinance would determine that relationship.

While the opinion request does not limit the answer to third and fourth class cities, towns, and villages, we believe it is appropriate to limit the opinion to third and fourth class cities, towns, and villages, inasmuch as that is only where the problem lies. Apparently, there is no difficulty experienced with charter cities since they treat their city attorneys as city employees for social security purposes. Additionally, it is our understanding that there are no first or second class cities in this state.

CONCLUSION

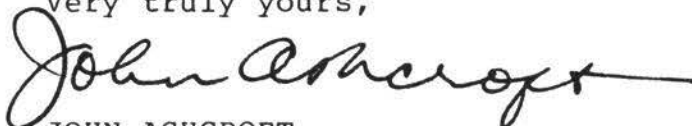
For the purposes of §§ 105.300, et seq., RSMo Supp. 1979, providing for social security tax reporting, it is the opinion of this office that the city attorney elected pursuant to § 77.370, RSMo 1978, is an employee of a third class city; the city counselor appointed under § 98.340, RSMo 1978, is an employee of a third class city; a special attorney appointed under § 98.340, RSMo 1978, is not an employee of a third class city. Further we are of the opinion that the city attorney of a fourth class city under § 79.230,

Mr. Stephen C. Bradford

RSMo 1978, is an employee of a fourth class city. Depending upon the legal relationship as defined by ordinance, under § 79.230, RSMo 1978, a special counsel may become an employee of a city as assistant city attorney for social security purposes. Further, we are of the opinion that a town or village may have an attorney who would be an employee pursuant to § 105.300(2), RSMo Supp. 1979, or may employ a special counsel who would be an independent contractor but the nature of the relationship would depend upon the ordinance and agreement with that particular attorney.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

COMMUNITY MENTAL HEALTH CENTER:
MENTAL HEALTH

1) Tax levy proposals submitted to a county vote for the purpose of establishing or maintaining a community mental health

service shall specify the exact amount of the proposed levy.

2) Tax levy proposals may be submitted to a county vote during either a primary or general election.

3) Notice by publication shall be given by the clerk of the governing body in the manner provided for in § 205.979, S.B. 652 79th General Assembly.

January 25, 1980

OPINION NO. 4

Paul R. Ahr, Ph.D., Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Ahr:

This opinion is in answer to your predecessor's inquiry on the following issues:

1. May a tax levy proposal submitted to a county vote for the purpose of establishing or maintaining a community mental health facility or service specify the exact amount of the proposed levy, the specified amount being less than or equal to thirty cents per one hundred dollars assessed valuation--as, for example, 'a tax of twenty-five cents per each one hundred dollars assessed valuation'--or must it state only 'a tax not to exceed thirty cents per each one hundred dollars assessed valuation?'

2. May a tax levy proposal for establishing or maintaining a community mental health facility or service be submitted to a county vote during a primary, rather than a general election?

3. Is the clerk of the governing body or other official authorized to give notice of elections required to publish a notice of the above-described tax levy proposal prior to the election in which it is submitted?

Your inquiry arises from the following facts: prior to the 79th General Assembly, the law with regard to the above issues was contained in §§ 205.977 and 205.978, RSMo 1969. These sections provided as follows:

205.977. 1. Whenever eight percent of the qualified voters of the county sign a petition and file it with the county court not less than forty-five days before the general election requesting an election be held on the question of establishing a community mental health service, it is the duty of the county court to submit the proposition to the voters of the county at the next general election, or the governing body of the county may adopt a resolution to submit the question to a vote of the people at the next general election.

2. The total vote cast for governor in the county at the last general election in which a governor was elected shall determine the number of qualified voters required for the petition.

205.978. 1. The clerk of the county court shall give notice of the election by causing a copy of the order of the court for the election and its purposes to be published three times in one or more newspapers of the county, the last publication to be not more than one week prior to the date of the election.

2. The ballot to be used for voting on the proposition shall be substantially in the following form:

OFFICIAL BALLOT

(Check the one for which you wish to vote.)

Shall (name of county or counties) establish (and) (or) maintain a community mental health service, and which the county court shall levy tax not to exceed 30 cents per each one hundred dollars assessed valuation therefor?

Yes

No

3. The election shall be conducted and the vote canvassed in the same manner as other county elections.

Under the statutes quoted above, the issues raised in your inquiry would be resolved as follows: (1) tax levy proposals for establishing or maintaining community mental health centers must state only "a tax not to exceed thirty cents per each one hundred dollars assessed valuation," without further specifying the amount; (2) such tax levy proposals may be submitted only at a general election; and (3) the clerk of the county court must give public notice of the tax levy proposal by publication of the county court order for the submission of this question to a vote in a local newspaper.

On May 15, 1978, the 79th General Assembly passed and sent to the Governor for his signature two pieces of legislation affecting the above issues. House Bill 971, signed by the Governor on June 8, 1978, was a comprehensive and exhaustive revision of all election laws in the State of Missouri, repealing 486 statutes and reenacting in their place 423 new provisions. H. B. 971 repealed §§ 205.977 and 205.978, above and enacted two new sections with the identical numbering. The new provisions provided as follows with regard to the questions at issue: (1) the requirement of the old statute that the tax levy proposal state only "a tax not to exceed thirty cents per each one hundred dollars assessed valuation" was not changed; (2) the specification that the proposal be submitted only at a general election was maintained; (3) all mention of any public notice requirement on the part of county officials was omitted.¹

The second law passed by the General Assembly on May 15, 1978, Senate Bill 652, was limited in scope and directed specifically toward amending the law with regard to community mental health services; this bill repealed 13 sections of the previously existing law (including §§ 205.977 and 205.978) and enacted 16 new provisions. S.B. 652 held as follows on the above issues: (1) the requirement that the tax proposal state "a tax not to exceed thirty cents per each one hundred dollars assessed valuation" was eliminated and replaced with the phrase "a tax of (insert exact amount to be voted upon) cents per each one hundred dollars assessed valuation"; (2) the specification of the old law that the tax levy proposal was to be submitted at the next general election was changed to include the next primary or general election; and (3) the

¹It should be noted, however, that additional statutory requirements of notice applicable to elections of this type are found in § 115.127, S.B. 275, 80th General Assembly and §§ 115.129 and 115.131, RSMo.

requirement of notice by publication was altered in several specifics from the formerly-effective law.

No previous Missouri case has ever dealt with this precise situation. That being the case, this conflict must be resolved by reference to well-recognized rules of statutory construction. The ultimate aim in the exercise of such rules is to ascertain and give effect to the intent of the legislature. Missouri Pacific R.R. Co. v. Kuehle, 482 S.W.2d 505, 509 (Mo. 1972); Edwards v. St. Louis County, 429 S.W.2d 718, 722 (Mo. banc 1968). The rule of construction dispositive of the above questions, as most recently stated in Kilbane v. Director of the Department of Revenue, 544 S.W.2d 9 (Mo. banc 1976), is as follows:

'In construing statutes to ascertain legislative intent it is presumed the legislature is aware of the interpretation of existing statutes placed upon them by the state appellate courts, and that in amending a statute or in enacting a new one on the same subject, it is ordinarily the intent of the legislature to effect some change in the existing law.' Id. at 11, quoting Gross v. Merchants-Produce Bank, 390 S.W.2d 591, 597 (K.C.Ct.App. 1965).

See also State ex rel Thompson-Stearns-Roger v. Schaffner, 489 S.W.2d 207, 209 (Mo. 1973); Darrah v. Foster, 355 S.W.2d 24, 30 (Mo. 1961); § 1.120, RSMo 1969. As this rule indicates, the act of a legislature in amending a statute (or reenacting it with certain specified changes) is one of particular significance in the determining of legislative intent; by changing the wording and effect of the statute, the drafting legislators have of necessity made an affirmative decision with regard to the substance of the act. By contrast, the reenactment of a particular provision without significant change in its wording is an ambiguous act, signifying in many cases that the drafters gave no thought to changing that statute or provision. This is particularly so when the enactment is as large and comprehensive as was H.B. 971.

Given the present direct conflict in statutes, it is the view of this office that the clearer indication of legislative intent must rule. Therefore, where one of the conflicting provisions makes an affirmative change in the previously existing law while the other merely reenacts or restates the prior law, the statutory change will be given effect. Similarly, where one of the conflicting statutes makes a substantive change from the requirement of the old

law and the other statute omits any mention of that requirement, the former provision will prevail. These holdings are consistent with and pursuant to two recent opinions of this office presenting analogous issues, Op. Atty. Gen. No. 180, Kirkpatrick, Dec. 29, 1978 (Mo.); and Op. Atty. Gen. No. 194, Ratcliff, Dec. 29, 1978 (Mo.) (attached).

Applying that standard to the case at hand, the following conclusions are reached: Tax levy proposals submitted to a county vote for the purpose of establishing or maintaining a community mental health service shall specify the exact amount of the proposed levy (§ 205.979, S.B. 652); tax levy proposals may be submitted to a county vote during either a primary or general election (§ 205.978, S.B. 652); notice by publication shall be given by the clerk of the governing body in the manner provided for in § 205.979, S.B. 652.

CONCLUSION

It is the opinion of this office with respect to community mental health services that:

1. Tax levy proposals submitted to a county vote for the purpose of establishing or maintaining a community mental health service shall specify the exact amount of the proposed levy.
2. Tax levy proposals may be submitted to a county vote during either a primary or general election .
3. Notice by publication shall given by the clerk of the governing body in the manner provided for in § 205.979, S.B. 652 79th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John M. Morris.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enc: 180/1978
194/1978

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

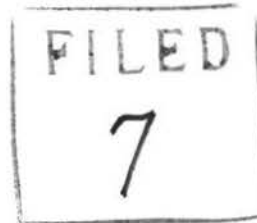
65102

(314) 751-3321

May 7, 1980

OPINION LETTER NO. 7
(Answer by Letter-Schroeder)

The Honorable James L. Mathewson
Representative, 113th District
Room 407, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Mathewson:

This is in response to your request for our opinion as to whether the Missouri Dental Board is required by law to draft certain of its rules in a permissive, rather than prohibitive, style or format, to specifically enumerate by list those duties that dental auxiliary personnel can perform, rather than to state just the functions which may not be delegated by a dentist to his dental assistants or dental hygienists, as do the present rules of the Missouri Dental Board. The referenced rules are 4 CSR 110-2.120 and 4 CSR 110-2.130.

Please be advised that Sections 536.010-536.050, RSMo 1978, which generally govern the promulgation and adoption of rules by a state agency, contain no provisions which require that rules be phrased so as to specifically grant one the authority to act, rather than to prohibit certain types of conduct. Likewise, we are aware of no other statutory or constitutional provision, or case law, which requires that a rule be phrased in a permissive sense, as a specific grant of authority, instead of a format wherein only certain conduct is prohibited. The specific statutory grant of rulemaking authority for the Missouri Dental Board, contained in Section 332.031, RSMo 1978, contains no such constraint.

Honorable James L. Mathewson

It is the opinion of this office that the Missouri Dental Board is not required to draft its rules so as to specifically list the duties that auxiliary dental personnel can perform, but may phrase its rules so as to permit or prohibit certain conduct, as it deems necessary and proper, within the scope of its rulemaking authority.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

EDUCATION:

DEPARTMENT OF MENTAL HEALTH:

Parents of school-aged handicapped or severely handicapped children admitted to the Department of

Mental Health may not be charged for special education and related services. If the admissions of any such children is necessary for them to receive appropriate special education and related services, then their parents may not be charged for special education, related services, nonmedical care, and room and board. School districts and special school districts are obliged to pay towards the costs of special education and related services rendered by the Department of Mental Health to its full-time patients or residents. Absent a contractual provision, we find no authority for the Department of Mental Health to charge the State Board of Education for special education it chooses to render to patients and residents of its facilities.

August 4, 1980

OPINION NO. 9

Paul R. Ahr, Ph.D., M.P.A.
Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Ahr:

This official opinion is issued in response to your predecessor's request for rulings on the following questions:

- "1. If handicapped or severely handicapped children, as defined under § 162.675 (2) and (3), RSMo 1978, are admitted to Department of Mental Health facilities, may the Department charge the parents or guardian for any services -- room and board, treatment, education?
- "2. If handicapped or severely handicapped children, as defined under § 162.675 (2) and (3), RSMo 1978, are admitted to Department of Mental Health facilities, may the Department charge school districts, special school districts or the State Board of Education for the services provided?"

QUESTION NO. 1

As to the first question, subsection 2 of § 630.205 of Conference Committee Substitute for H.B. 1724 is directly on point. The General Assembly passed this bill during the recent session, and the Governor signed it on June 9, 1980; consequently, it becomes effective on August 13, 1980.

Subsection 2 of § 630.205 of H.B. 1724 reads as follows:

"Parents of minors who are domiciled in this state, as defined in section 162.970, RSMo, shall not be liable for the cost of education or special education and related services. If, as a result of a comprehensive evaluation and such conclusion in the minor's individualized education program, admission to a department facility or placement program is necessary for such minor to receive an appropriate education, the parents of minors who are domiciled in this state under section 162.970, RSMo, shall not be liable for the cost of nonmedical care and room and board."

The definitions of "handicapped children" and "severely handicapped children" are found in section 162.675(2) and (3), RSMo 1978, respectively, as follows:

"(2) 'Handicapped children', children under the age of twenty-one years who have not completed an approved high school program and who, because of mental, physical, emotional or learning problems, require special educational services in order to develop to their maximum capacity;

"(3) 'Severely handicapped children', handicapped children under the age of twenty-one years, who because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The terms 'severely handicapped' is not confined to a separate and specific category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs; . . ."

Paul R. Ahr, Ph.D., M.P.A.

The term "special education" has a special meaning for handicapped and severely handicapped children beyond just instruction in the usual elementary and secondary school subjects. Under section 162.670, RSMo 1978, "special educational services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children" are required to be provided by the state or by the public schools in the state. The term "special educational services" is defined in section 162.675(4) as follows:

"... programs designed to meet the needs and maximize the capabilities of handicapped or severely handicapped children and which include, but are not limited to, the provisions of diagnostic and evaluation services, student and parent counseling, itinerant, homebound and referral assistance, organized instructional and therapeutic programs, transportation, and corrective and supporting services."

Under subsection 3 of section 630.205, H.B. 1724, the federal definitions of the terms "special education" and "related services", as found in 20 U.S.C. § 1401, are specifically incorporated by reference.

The term "special education" is defined at 20 U.S.C. § 1401(16), as follows:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."

The term "related services" has been broadly defined at 20 U.S.C. § 1401(17), as follows:

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

Paul R. Ahr, Ph.D., M.P.A.

Rather than dividing the children who need special education into separate groups of "handicapped children" and "severely handicapped children" as done under Missouri law in section 162.675(2) and (3), RSMo 1978, the federal law has just one group of "handicapped children", who, by reason of their handicap, require special education and related services. 20 U.S.C. § 1401(1). Thus, the federal term encompasses both of the state terms.

In the regulations promulgated under 20 U.S.C. § 1401, et seq., the term "related services" is more elaborately defined and offers further guidance on what services are to be provided without charge to parents. The definition is located at 45 C.F.R. § 121a.13.

Parents may clearly be charged for certain services "not related" to special education including medical treatment of their handicapped or severely handicapped children who are inpatients or residents of Department of Mental Health facilities. See Tatro v. State of Tex., 481 F.Supp. 1224 (N.D. Texas 1979) where the court determined that catheterization of a child suffering from spina bifida was not a "related service" but a life maintenance service "required whether or not she is attending school." Parents have a common-law obligation to support their minor children, Ivey v. Ayers, 301 S.W.2d 790 (Mo. 1957), and State ex rel. Shoemaker v. Hall, 257 S.W. 1047 (Mo. 1924); however, if the service falls within the definitions of "special education" or "related services," then under section 630.205, H.B. 1724, the parents are not obliged to pay for them.

The Department shall determine whether a particular service may be charged to parents depending upon whether it is classified as medical treatment or special education or related service. Distinctions must be considered on a case-by-case basis for school-aged children. Generally, under subsections 2 and 3 of section 630.205, which incorporate the federal definitions, services required to assist the handicapped or severely handicapped child to benefit from education shall be provided without charge to parents; however, if the services are strictly medical in nature, then the services may be charged to the parents.

Finally, subsection 2 of section 630.205 states that parents shall not be liable for the cost of nonmedical care and room and board, if, as a result of a comprehensive evaluation and such conclusion in the minor's individualized education program, admission to a department facility is necessary for the child to receive an education. Thus, after a handicapped or severely handicapped child has been admitted to a Department of Mental Health facility, the department shall determine, in each instance, if the admission was necessary for the child to receive an appropriate education.

Paul R. Ahr, Ph.D., M.P.A.

For example, if the child can be appropriately educated off the facility grounds by the school district or special school district where the facility is located or by the state school for the severely handicapped operated by the State Board of Education, as authorized under section 162.970, RSMo 1978, then the admission is not necessary for the child to receive an appropriate education. Rather, the admission may be necessary for certain medical, habilitation, or other reasons. For example, children could be committed to the Department of Mental Health by the juvenile court, or the parents may admit their children because they may not wish to keep them at home. However, if they were living at home, and could appropriately be educated by the school district, special district, or state school for the severely handicapped, then the parents would be responsible for non medical care and room and board.

"Non-medical care" is not defined in the statute or regulations. It would be logical for it to mean assisting the handicapped or severely handicapped children with such activities as dressing, toileting and grooming. These are services usually performed by parents who could not do them if the child is in residential placement.

In conclusion, the parents of school-aged children may be charged for services other than education, special education, and related services unless the admissions are necessary for them to receive appropriate education. Regarding those children whose admission to the Department of Mental Health facilities are found to be necessary for them to receive appropriate education, their parents may not be charged for special education, related services, nonmedical care, and room and board.

QUESTION NO. 2

As to the second question, section 162.740 in H.B. 1724 requires the school district or special school district of residence to pay towards the cost of the education of a child attending an educational program for a full-time patient or resident at a Department of Mental Health facility. Section 162.740, H.B. 1724, reads as follows:

"The district of residence of each child attending a state school for severely handicapped children, an institution providing contractual services arranged pursuant to section 162.735, or an educational program for a full-time patient or resident at a facility

Paul R. Ahr, Ph.D., M.P.A.

operated by the department of mental health except school districts which are a part of a special district and except special school districts, shall pay toward the cost of the education of the child an amount equal to the average sum produced per child by the local tax effort of the district. The district of residence shall be notified each year, not later than December fifteenth, of the names and addresses of pupils enrolled in such schools. In the case of special district, said special district shall be responsible for an amount per child not to exceed the average sum produced per child by the local tax efforts of the component districts. The district of residence of the child's parents or guardians shall be the district responsible for local tax contributions required by this section."

Section 162.745, H.B. 1724, sets out a means of collecting the money.

Subsection 2 of section 162.970, RSMo 1978, requires school districts or special school districts of the domicile of handicapped or severely handicapped children to pay towards the cost of special educational services for such children. Under subsection 1 of section 162.970, the Department of Mental Health may provide special education to handicapped or severely handicapped children.

The school district of domicile is the place of residence of the parents. Section 162.970.7. Section 162.970 when read with section 162.740 would require the school district where the parents reside pay towards the cost of education.

Although under section 162.725, RSMo 1978, the State Board of Education has the primary responsibility to provide special education services to certain severely handicapped children, we find no authority for holding the Board responsible to pay the Department of Mental Health for the special education the Department provides to handicapped or severely handicapped children admitted to Department facilities. Under section 162.735, the State Board of Education may contract with "another public agency" to provide special educational services determined to "be in the best interests" of the severely handicapped children; however, absent provisions for payment in such a contract, the State Board of Education has no statutory responsibility to pay for the special educational services provided by the Department of Mental Health.

Paul R. Ahr, Ph.D., M.P.A.

CONCLUSION

Therefore, it is the opinion of this office that parents of school-aged handicapped or severely handicapped children admitted to the Department of Mental Health may not be charged for special education and related services. If the admissions of any such children is necessary for them to receive appropriate special education and related services, then their parents may not be charged for special education, related services, non-medical care, and room and board. School districts and special school districts are obliged to pay towards the costs of special education and related services rendered by the Department of Mental Health to its full-time patients or residents. Absent a contractual provision we find no authority for the Department of Mental Health to charge the State Board of Education for special education it chooses to render to patients and residents of its facilities.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Reginald H. Turnbull.

Very truly yours,


John Ashcroft
Attorney General

EDUCATION:

DEPARTMENT OF MENTAL HEALTH:

Parents of school-aged handicapped or severely handicapped children placed by the Department of Mental

Health with community placement providers may not be charged for special education and related services. If the placement of any such children is necessary for them to receive appropriate special education and related services, then their parents may not be charged for special education, related services, nonmedical care, and room and board. School districts and special school districts of domicile are obliged to pay towards the costs of special education and related services rendered by the serving school districts and special school districts. The State Board of Education shall provide special educational services to the severely handicapped children who cannot receive such services from the school districts where the children actually reside.

August 4, 1980

OPINION NO. 10



Paul R. Ahr, Ph.D., M.P.A.
Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Ahr:

This official opinion is issued in response to your predecessor's request for rulings on the following questions:

"1. If the Department of Mental Health diagnoses and places a handicapped or severely handicapped child with a community placement provider, under what circumstances, if any, and to what extent shall the parents be charged by the provider for residential care, treatment, or education?

"2. If the Department of Mental Health diagnoses and places a handicapped or severely handicapped child with a community placement provider, under what circumstances and to what extent shall the State Board of Education or the school district or special school district of domicile pay or otherwise provide for the child's residential care, treatment and education?"

Paul R. Ahr, Ph.D., M.P.A.

QUESTION NO. 1

As to the first question, subsection 2 of § 630.205 of Conference Committee Substitute for H.B. 1724 is directly on point. The General Assembly passed this bill during the recent session, and the Governor signed it on June 9, 1980. It becomes effective on August 13, 1980.

Subsection 2 of § 630.205 of H.B. 1724 reads as follows:

"Parents of minors who are domiciled in this state, as defined in section 162.970, RSMo, shall not be liable for the cost of education or special education and related services. If, as a result of a comprehensive evaluation and such conclusion in the minor's individualized education program, admission to a department facility or placement program is necessary for such minor to receive an appropriate education, the parents of minors who are domiciled in this state under section 162.970, RSMo, shall not be liable for the cost of nonmedical care and room and board."

Under subsection 3 of section 630.205, H.B. 1724, the federal definitions of the terms "special education" and "related services", as found in 20 U.S.C. § 1401, are specifically incorporated by reference for use in the section. Consequently, the terms "special education" and "related services", as used in subsection 2, are defined by the federal law.

The term "special education" is defined at 20 U.S.C. § 1401(16), as follows:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."

The term "related services" has been broadly defined at 20 U.S.C. § 1401(17) as follows:

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

Subsection 3 of section 630.205 further incorporates the definitions of the terms "special education" and "related services" from the regulations promulgated under 20 U.S.C. § 1401, et seq. The term "related services" is more elaborately defined and offers further guidance on what services are to be provided without charge to parents. That definition is found at 45 C.F.R. § 121a.13.

The definitions of "handicapped children" and "severely handicapped children" which were used in the questions are found in section 162.675(2) and (3), RSMo 1978, respectively, as follows:

"(2) 'Handicapped children', children under the age of twenty-one years who have not completed an approved high school program and who, because of mental, physical, emotional or learning problems, require special educational services in order to develop to their maximum capacity;

"(3) 'Severely handicapped children', handicapped children under the age of twenty-one years, who because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The terms 'severely handicapped' is not confined to a separate and specific category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs; . . ."

Although the federal law refers to one group of "handicapped" children rather than dividing them into two groups in need of

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special education as under section 162.675(2) and (3), RSMo 1978, the terms are similar, in that the children require special education and related services. 20 U.S.C. § 1401(1).

Under 630.640, H.B. 1724, parents are to be charged for the support and maintenance of their children in community placement if the children are supported from funds appropriated to the Department of Mental Health. Section 630.205, however, is incorporated by reference, as follows in subsection 2 of section 630.640:

"If payments for the support and maintenance of of the client are made from funds appropriated to the department, the department shall charge the client or those responsible for his support under this chapter for his support and maintenance pursuant to section 630.205 to 630.215."

Parents may clearly be charged for certain services "not related" to special education including medical treatment of their handicapped or severely handicapped children who have been placed by the Department with community placement providers. See Tatro v. State of Tex., 481 F.Supp. 1224 (N.D. Texas 1979) where the court determined that catheterization of a child suffering from spina bifida was not a "related service" but a life maintenance service "required whether or not she is attending school." Parents have a common-law obligation to support their minor children, Ivey v. Ayers, 301 S.W.2d 790 (Mo. 1957), and State ex rel. Shoemaker v. Hall, 257 S.W. 1047 (Mo. 1924); however, if the service falls within the definitions of "special education" or "related services," then under section 630.205, H.B. 1724, the parents are not obliged to pay for them.

The Department shall determine whether a particular service may be charged to parents depending upon whether it is classified as medical treatment or special education or related service under the individualized education plan. Distinctions must be considered on a case-by-case basis for school-aged children. Generally, under subsections 2 and 3 of section 630.205, services identified in the individualized education plan as being required to assist handicapped or severely handicapped child to benefit from special education shall be provided without charge to parents; however, if the services are not included as special education or related services, then the services may be charged to the parents.

Finally, subsection 2 of section 630.205 states that parents shall not be liable for the cost of nonmedical care and room and board, if, as a result of a comprehensive evaluation and such

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conclusion in the minor's individualized education program, admission to a department placement program is necessary for the child to receive an education. Thus, after a handicapped or severely handicapped child has been placed with a community placement provider, the department shall determine, in each instance, if the placement was necessary for the child to receive an appropriate education.

Generally, if the child can be educated off the placement-provider grounds, as authorized under section 162.970, RSMo 1978, by the school district or special school district where the placement-provider is located or by the state school for the severely handicapped operated by the State Board of Education, then the placement would not be considered necessary for the child to receive an appropriate education. Rather, the placement may be necessary for certain medical, habilitation, or other reasons. For example, children could be committed to the Department of Mental Health by the juvenile court, or the parents may seek placement of their handicapped or severely handicapped children because the parents do not wish to take care of them at home. However, if the children were living at home, they could be educated by the school district, special district, or state school for the severely handicapped responsible for special educational service where the parents live without the necessity for a residential placement.

"Non-medical care" is not defined in the statute or regulations. It would be logical for it to mean assisting the handicapped or severely handicapped children with such activities as dressing, toileting and grooming. These are services usually performed by parents who cannot do them if their children are not living at home but are placed by the Department with community placement providers.

In conclusion the parents of school-aged children may be charged for services other than education, special education, and related services unless their placements are necessary for them to receive appropriate education. Regarding those children placed by the Department and found by the Department to need residential placements to receive appropriate education, their parents may not be charged for special education, related services, nonmedical care, and room and board.

QUESTION NO. 2

As to the second question, each school district or special school district constituting the domicile of any handicapped or severely handicapped child shall pay the average local tax

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effort produced per child to the serving school district or special school district where the handicapped or severely handicapped child actually resides under subsections 2 and 3 of section 162.970.

Subsection 2 of 162.970, RSMo 1978, reads as follows:

"2. Each school district or special school district constitution the domicile of any handicapped or severely handicapped child for whom special educational services are provided or procured under this section, shall pay toward the per pupil costs for special educational services for such child. A school district which is not a special school district shall pay an amount equal to the average sum produced per child by the local tax effort of the district of domicile. A special school district shall pay the average sum produced per child by the local tax efforts of the component districts."

In subsection 3 of section 162.970, the mechanism for such payments is provided as follows:

"3. When special educational services have been provided by the school district or special school district in which a handicapped or severely handicapped child actually resides, other than the district of domicile, the amounts as provided in subsection 2 for which the domiciliary school district or special school district is responsible shall be paid by such district directly to the serving district. The school district, or special school district, as the case may be, shall send a written voucher for payment to the regular or special district constituting the domicile of the child served and the domiciliary school district or special school district receiving such voucher shall pay the district providing or procuring the services the amount hereinabove provided. In the event the responsible district fails to pay the appropriate amount to the district within ninety days after a voucher is submitted, the state department of elementary and secondary education shall deduct the appropriate amount due from the next payments of any state financial aid due that district and shall pay the same to the appropriate district."

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The "domicile of a child" shall be the place of residence of his parents or legal guardian under subsection 7 of section 162.970. Thus, school districts or special school districts of domicile shall pay no more than the average per capita local tax effort to the serving school districts on actual costs.

Under subsection 1 of section 162.970, handicapped or severely handicapped children whose domicile is in one school district in Missouri but who reside in another school district as a result of placement, shall have a right to be provided special educational services. Furthermore, they are not to be denied admission to any appropriate regular public school or special school district program or program operated by the State Board of Education, as the case may be, where the child actually resides because of the placement.

Thus, the appropriate entity with responsibility to serve children placed by the department depends upon their diagnoses as "handicapped" or "severely handicapped." Under section 162.700, RSMo 1978, the Board of Education of each school district shall provide the educational services for handicapped children who reside in the district. Under section 162.890, RSMo 1978, special school districts are responsible for the training or education of handicapped or severely handicapped children who reside within the boundaries of the special district.

Severely handicapped children who are not being provided special educational services by the school district or who do not reside in a special school district shall be provided the services by the State Board of Education under sections 162.725 and 162.735, RSMo 1978, by contract, or under section 162.730, in a state school for the severely handicapped.

While special education services are the responsibility of the local school district, special school district or State Board of Education for handicapped and severely handicapped children placed by the Department of Mental Health, no express provision is made for the districts or the state board to pay for nonmedical care and room and board. As we discussed in Part I of this opinion, nonmedical care and room and board are the responsibility either of the Department of Mental Health or of the parents (according to their abilities to pay) depending upon whether the placements are necessary for the children to receive appropriate special education.

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In subsection 4 of section 162.970, the Department of Mental Health is to pay the serving district from funds appropriated for that purpose any amounts by which the costs of educating severely handicapped children placed by the Department exceed the amounts received from the domiciliary districts. The Department of Mental Health shall pay the difference between the actual costs of educating the handicapped or severely handicapped children and the average local tax effort paid by the school districts of domicile. In subsection 1 of section 630.640, H.B. 1724, the Department of Mental Health is to supplement the other benefits to which a placement client is entitled. No such statutory limit is placed on amounts to be paid by the State Board of Education. The Board is limited only by appropriations.

CONCLUSION

Therefore, it is the opinion of this office that parents of school-aged handicapped or severely handicapped children placed by the Department of Mental Health with community placement providers may not be charged for special education and related services. If the placement of any such children is necessary for them to receive appropriate special education and related services, then their parents may not be charged for special education, related services, nonmedical care, and room and board. School districts and special school districts of domicile are obliged to pay towards the costs of special education and related services rendered by the serving school districts and special school districts. The State Board of Education shall provide special educational services to the severely handicapped children who cannot receive such services from the school districts where the children actually reside.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Reginald H. Turnbull.

Very truly yours,


John Ashcroft
Attorney General

COUNTY COLLECTORS: County collector of Morgan County is entitled
COMPENSATION: to a commission for collecting delinquent and
back taxes of two percent on the amount of de-
linquent or back tax plus interest and penalties,
pursuant to § 52.290, RSMo.

June 18, 1980

OPINION NO. 11

The Honorable James F. Antonio
State Auditor
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Antonio:

This opinion is in response to a request from your office
asking as follows:

Is the County Collector of Morgan
County entitled to a commission for
collecting delinquent and back taxes
of two percent on the amount of delin-
quent or back tax only or two percent
on the amount of delinquent or back
tax plus interest and penalties?

Morgan County is a third class county.

In Opinion No. 13, dated March 26, 1943, to Burke, this
office concluded that the county collector is entitled to only
two percent on the delinquent tax and not on other penalties
or interest. Similarly, in our Opinion No. 83, dated June 15,
1943, to Smith, this office concluded that the county collector
is entitled to only two percent on the delinquent tax and not
on other penalties or interest. The conclusions reached in
these opinions were based upon the view that § 11106, RSMo 1939,
referred to only a two percent commission on all back taxes and
all other delinquent taxes, and that such section superseded
inconsistent language in § 11182, RSMo, 1939, which purported
to allow two percent on all sums collected. In our Opinion No.
31, dated May 9, 1957, to Francka, this office relied upon the
1943 opinion and again concluded that the two percent charge
should be made on the delinquent tax only and not on the delin-
quent tax plus other penalties or interest.

The Honorable James F. Antonio

However, that portion of § 11106, RSMo 1939, which we found to control in our earlier opinions, was deleted in 1959 at the same time that § 11182, RSMo 1939, was last amended, giving us the present § 52.290.

Section 52.290, RSMo, now provides:

In all counties the collector shall be allowed a commission for the collection of delinquent and back taxes of two percent on all sums collected to be added to the face of the tax bill and collected from the party paying the tax.

This section clearly now allows the collector such a commission on all sums collected which would include interest and penalties.

In our Opinion No. 8, dated January 9, 1975, to the State Auditor, this office concluded that the compensation of ex officio collectors of township counties was governed by § 54.320, and that such ex officio collectors in township counties are not entitled to a commission on the amount of interest or other penalties collected on delinquent taxes. In reaching that conclusion, we referred to the 1943 opinions and the 1957 opinion mentioned above. Such reference to the three prior opinions based upon statutes which were not relevant to the ex officio collector in township counties was unnecessary.

We are therefore withdrawing the two 1943 opinions and the 1957 opinion. We are not withdrawing the 1975 opinion; however, in the future when it is disseminated to the public, it will be accompanied by a copy of this opinion.

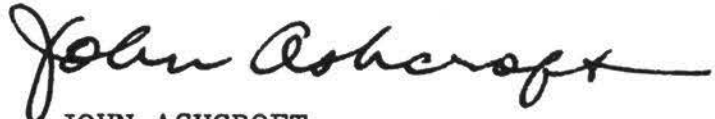
CONCLUSION

It is the opinion of this office that the county collector of Morgan County is entitled to a commission for collecting delinquent and back taxes of two percent on the amount of delinquent or back tax plus interest and penalties, pursuant to § 52.290, RSMo.

The Honorable James F. Antonio

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

DIVISION OF CORRECTIONS: A defendant sentenced to serve
CRIMINAL LAW: consecutive terms of imprisonment
under the new criminal code must
have his actual conditional release date computed by adding
up the total of his prison terms on his respective consecutive
sentences. He should be released on conditional release at
the end of that total period of time. The length of his
conditional release period is determined by adding the total
of the conditional release terms on the respective consecutive
sentences.

March 13, 1980

OPINION NO. 12

Mr. David Freeman, Director
Missouri Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Freeman:

This is in response to a request for an opinion by
Mr. David Blackwell, Director of the Missouri Division of
Corrections. Since he is a director within your Department
we assumed his request was with your approval. His request
reads as follows:

Under the Criminal code when multiple
sentences are specified by the Court to
run consecutive, shall they run consecutive
as individual sentences or consecutive in
the aggregate? To put it another way, shall
two or three consecutive sentences be served
as individual sentences for prison time and
conditional release time or cumulative as
one whole sentence?

When a defendant's felony sentences of imprisonment
under the new criminal code must run consecutively there are
questions raised as to how the date upon which the defendant
should actually be released on his conditional release term
is to be determined and how long the conditional release
term will be. Under § 558.011 (Senate Bill 234, 80th Gen.
Assembly), when a sentence of imprisonment is imposed, it
consists of a "prison" term during which the defendant is
incarcerated, unless released on parole pursuant to § 549.261,
RSMo 1978, and a "conditional release" term which involves
the release of the defendant, if he has not already been

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released on parole, to the custody of the parole board to be supervised according to conditions set down by that board until the end of the complete term of the sentence. The portions of the sentence of imprisonment to be allocated to the prison terms and conditional release terms are set out in § 558.011.4. Section 558.011.4 is set out as follows:

4. (1) A sentence of imprisonment for a term of years shall consist of a prison term and a conditional release term. The conditional release term of any term imposed under section 557.036, RSMo, shall be:

(a) One-third for terms of nine years or less;

(b) Three years for terms between nine and fifteen years;

(c) Five years for terms more than fifteen years, including life imprisonment; and the prison term shall be the remainder of such term.

(2) "Conditional release" means the conditional discharge of a prisoner by the division of corrections subject to conditions of release that the state board of probation and parole deems reasonable to assist the offender to lead a law-abiding life, and subject to the supervision under the state board of probation and parole. The conditions of release shall include avoidance by the offender of any other crime, federal or state, and shall prohibit technical violation of his probation and parole.

The problem posed by the opinion request is illustrated by the example of a defendant who would be sentenced to two terms of imprisonment, one for three years the other for twelve years, the second to run consecutive to the first. The prison and conditional release terms for the three year sentence would be two years and one year respectively. The prison and conditional release terms for the second sentence would be nine years and three years respectively. There are two possible ways to compute the actual conditional release date of this defendant. The first would be to aggregate the two sentences of imprisonment and consider them as a single fifteen year sentence. If done this way, the prison term would be twelve years and the conditional release term three years. The other manner of determining the conditional release date would be to add the prison terms and conditional

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release terms of each of the respective sentences and require the defendant to serve the total of the prison term and then be released at the end of that date to serve the total of the conditional release terms. If figured this way, the defendant in the above example would serve an eleven year prison term and a four year conditional release term. His imprisonment would be one year less than figured in the first way but he would remain on conditional release for one more year.

While § 558.026.1, RSMo 1978, provides statutory authority for a court to impose consecutive sentences, there is nothing explicit in the code to resolve the computation problem described above. Indeed, there is nothing specific addressing itself to resolution of this problem either in common law or pre-code Missouri statutory law. Normally, when a state has provisions for mandatory release before the end of the sentence, it also has a statute prescribing the effect of consecutive sentences. See for example, Illinois: S.H.A. ch. 38, § 1005-8-1 and § 1005-8-4(e)(2) (as amended by P.A. 80-1099, § 3, eff. February 1, 1978); North Carolina: N.C. §§ 15A-1371(f) and 15A-1354(b) (1979 Cum. Supp.). Virginia does not have such a clarifying statute for its mandatory release provisions, Va. Code § 53-251.3 (1979, cc. 700, 703) and § 19.2-311 (1976, c. 498), and has no decisional law or Attorney General's opinions to provide any authority helpful to resolving this opinion.

The mandatory conditional release structure adopted in the new code is unique to this state and does not appear to be modelled on any other set of statutes. See Proposed Code § 3.010(4), Comments, pp. 44-45; The New Missouri Criminal Code: A Manual for Court Related Personnel, § 3.2, Comments on § 558.011.4, p. 3. Therefore, we must utilize the general principles established by Missouri courts for the interpretation and construction of statutes in general and those relating to criminal sentencing in particular.

The primary object of statutory interpretation is to ascertain the intent from the words used in the statutes giving them their plain and rational meaning. State v. Wright, 515 S.W.2d 421, 427 (Mo. banc 1974). The interpretation should promote the object, purpose and policy of the statute, id., with it being presumed that the legislature did not intend to enact an absurd law incapable of being enforced. Bank of Belton v. State Banking Board, 554 S.W.2d 451, 456 (Mo.App., K.C.D. 1977); State ex rel. Safety Ambulance

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Service, Inc., v. Kinder, 557 S.W.2d 242, 247 (Mo. banc 1977). Effectuating the object and purpose of the law is so important in construing statutes that courts have given priority to that object and purpose over the literal terms of the statute, especially where there is ambiguous or contradictory language. Bank of Belton v. State Banking Board, supra, at 456; State ex rel. Safety Ambulance Service, Inc., v. Kinder, supra, at 247. The purpose and object of the statute is determined from the words used in the statute, taking them both at their plain meaning and as viewed in the totality of the enactment and in light of the evil to be remedied and the circumstances existing at the time of the enactment of the statute. Bank of Belton v. State Banking Board, supra; State ex rel. Safety Ambulance Service, Inc., v. Kinder, supra; and State v. Wright, supra. When the legislature adopts a code or parts thereof, it is reasonable to conclude that they did so with the intention of adopting the accompanying interpretation by the drafters. State v. Anderson, 515 S.W.2d 534, 539 (Mo. banc 1974).

Since Missouri statutes give no explicit directions on how consecutive sentences of different lengths affect each other in regard to the computation of the actual release date on the conditional release term, we are left with determining what the General Assembly intended from the application of the above mentioned general principles of statutory interpretation. Because we are construing statutes dealing with the punishment administered for a crime, these principles must be applied in a manner which renders the law construed liberally in favor of the defendant and strictly against the State. State v. Treadway, 558 S.W.2d 646, 652-653 (Mo. banc 1977), cert. denied, ___ U.S. ___, 99 S.Ct. 124 (1978); reversed on other grounds, Sours v. State, No. 61458 (Mo. banc January 15, 1980). In Treadway, the court was determining whether the legislature intended to mandate consecutive sentencing for armed criminal action, § 559.225, RSMo Supp. 1976, when the statute allowed that the sentence for armed criminal action must be imposed "in addition to" any other sentence. The court held that in construing the penalty provision liberally in favor of the defendant and strictly against the State it was not to be presumed that the punishment extended further than expressly stated and that the milder penalty should, therefore, be preferred over the harsher. Id. The court concluded that the armed criminal action statute did not mandate consecutive sentencing.

Another relevant factor in determining the legislative intent is the purpose of the conditional release term. The concept is entirely new to Missouri penal law and the fact

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that the legislature enacted something changing so radically the previous laws on sentencing would be relevant in determining their intent. According to the terms of § 558.011.4(2), conditional release is in effect mandatory parole. The defendant is released to the supervision of the State Board of Probation and Parole to be supervised under conditions set by it prohibiting the defendant from violating the law and also allowing purely "technical" conditions. If he violates the terms of his conditional release, that release can be revoked by the Board the same as if he were a parolee. Section 558.031.5, RSMo 1978. When returned to the prison, he must serve the remainder of the conditional release term as an additional prison term unless he is sooner released on parole. Section 558.031.5, RSMo 1978.

The drafters of the code equated the purposes of conditional release with those of parole, providing a period of transition from prison into complete freedom in society to help prevent recidivism. However, they also provided a deterrent against unacceptable conduct while on conditional release by requiring the defendant who is revoked on conditional release to serve the rest of his conditional release term as a prison term. Proposed Code, § 3.010(4), Comments, pp. 44-45. The fact that this "mandatory parole" was entirely new to Missouri law, parole having been strictly up to the discretion of the State Board of Probation and Parole before that, the new sentencing structure appears to be a liberalizing one rather than a more severe one.

Both the rule of statutory construction of penal statutes in Treadway and the evident liberalizing intent behind the legislature's provision for a conditional release term impel the conclusion that the actual conditional release date must be computed in the manner providing for the shortest prison term, i.e., by aggregating the prison and conditional release terms rather than treating the several sentences as one sentence. Supportive of the conclusion that consecutive sentences are not to be considered as "one term" is the principle in Missouri sentencing law that a court must impose separate sentences when a defendant is convicted of more than one crime, rather than imposing a single general sentence covering all of the crimes. State v. Meadows, 55 S.W.2d 959 (Mo. 1932); State v. Gonterman, 588 S.W.2d 754 (Mo.App., S.D. 1979). While it is true that in providing for consecutive sentencing, the legislature obviously recognized this as a means for inflicting more onerous punishment, this intent is still effectuated by the increased amount of time the defendant

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must spend on his prison term as a result of the aggregation of his prison terms, and the increased amount of time he must spend on his conditional release term. Referring to our previous example, the defendant is not free to be released on conditional release at the end of nine years, as he would if the sentences were run concurrently, and then spend only three years on conditional release; but rather he must spend two additional years in prison and an additional year on conditional release. The New Missouri Criminal Code: A Manual for Corrections Personnel, § 3.7.

Another question arises about the length of the conditional release term. Does § 558.011.4(1)(c), provide that the conditional release time served on consecutive sentences cannot exceed five years total? This in effect would be to run all conditional release terms on the consecutive sentences concurrently. Such a result has no foundation in the statutory language or decisional law of Missouri. As indicated previously, consecutive sentencing is authorized by § 558.026.1, RSMo 1978, which provides that "[m]ultiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively." A "sentence of imprisonment" consists of both a prison term and a conditional release term. Section 558.011.4(1). There is no authority to authorize the Division of Corrections to run concurrently conditional release terms which are a part of sentences of imprisonment ordered by a court to run consecutively. The New Missouri Criminal Code: A Manual for Corrections Personnel, § 3.7. The power to run sentences consecutively or concurrently is left exclusively up to the court, § 558.026.1, without any discretion given to the Division of Corrections to modify sentences imposed thereunder.

This conclusion is reinforced by language in § 558.011.4(1), which provides:

The conditional release term of any term imposed under section 557.036, RSMo, shall be:

* * *

(c) Five years for terms more than fifteen years, including life imprisonment; and the prison term shall be the remainder of such term. [emphasis added]

The use of the phrase "any term" indicates a conditional release term for each individual term or sentence of imprisonment. The plural "terms" is used in subsection (1)(c) because terms of various lengths can be chosen by the court for periods of over fifteen years. The use of the plural

Mr. David Freeman

does not indicate that conditional release terms of five years are the most that can be imposed on any collection of terms of imprisonment. The rule as previously stated in State v. Treadway, supra, requiring a liberal construction of criminal sentencing laws in favor of the defendant has never been taken to mean that criminal laws must have read into them language that is not there or be interpreted in an extremely attenuated or strained manner. Furthermore, a lengthy conditional release term can be considered consistent with the concept that consecutive sentences can be imposed when the circumstances of the offense and the character of the defendant require a longer total period of imprisonment and supervision. It is reasonable to infer that those same circumstances would require, in the judgment of the sentencing judge, a lengthy period of parole board supervision during which the defendant is under the deterrent of having to return to imprisonment if the conditions of that release are violated.

Simply because there may be instances in which a defendant serving consecutive sentences must serve a longer conditional release term than a person serving those same sentences concurrently does not present a problem which the Division of Corrections is authorized to resolve by means of running the conditional release terms concurrently. The fact that one inmate will be serving a longer conditional release term than another is simply a result of an act of discretion on the part of the sentencing judge as to which defendants need extended periods of supervision on conditional release and which do not.

The fact that it may be argued that it makes more sense either administratively or penologically to consider consecutive sentences as one term for purposes of determining the conditional release date and the length of the conditional release term is irrelevant to the determination of the question in this opinion. The question in this opinion is what authority the Division of Corrections has under the statutes and decisional law of this state to determine when a person serving consecutive sentences will be conditionally released and by what authority the State Board of Probation and Parole shall determine when he shall be released from the conditional release state. The existence of such authority must be determined from the statutes and decisional law according to the principles delineated above. Provisions as to administrative and penological policy can be implemented only by the legislature. Only the legislature, as did those

Mr. David Freeman

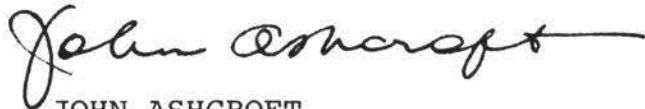
in North Carolina and Illinois, can determine that sentences ordered by a judge to be run consecutively can in fact be run in part concurrently by means of considering them to be a single sentence for purposes of determining the conditional release date and the date of complete discharge from the conditional release term.

CONCLUSION

It is the opinion of this office that a defendant sentenced to serve consecutive terms of imprisonment under the new criminal code must have his actual conditional release date computed by adding up the total of his prison terms on his respective consecutive sentences. He should be released on conditional release at the end of that total period of time. The length of his conditional release period is determined by adding the total of the conditional release terms on the respective consecutive sentences.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul Robert Otto.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

PENSIONS:
RETIREMENT:
MISSOURI STATE
EMPLOYEES' RETIREMENT SYSTEM:

The provisions of subsection
15 of § 104.310, RSMo Supp.
1979, relating to the defi-
nition of "employee" insofar
as the Missouri State Employees'
Retirement System laws are

concerned and providing that the word "employee" does not include any employee who is currently accumulating benefits under some other retirement or benefit fund to which the state is a contributor is not retroactive but is applicable beginning January 1, 1979. Such provisions allow certain persons to come within the definition of "employee" and to receive membership credit beginning January 1, 1979, if they are not accumulating benefits in another system to which the state is a contributor.

July 29, 1980

OPINION NO. 14

Mr. Al F. Holmes, Jr.
Executive Secretary
Missouri State Employees'
Retirement System
Post Office Box 209
Jefferson City, Missouri 65102

Dear Mr. Holmes:

This opinion is in response to a question from your office asking whether a member of the General Assembly whose term of office expired on January 3, 1979, and who is presently retired and receiving benefits from the Public School Retirement System of Missouri, is eligible to receive retirement benefits from the State of Missouri as a result of the passage of Senate Bill No. 497, 79th General Assembly which became effective on January 1, 1979.

You have also asked whether our conclusion with respect to your question would also apply to other "members" of the system.

Senate Bill No. 497 which was passed by the Second Regular Session of the 79th General Assembly and signed by the Governor, provided in part for the repeal of § 104.310, RSMo Supp. 1975, and enacted in lieu thereof a new section relating to the same subject matter, with an effective date of January 1, 1979. In this regard, the term "employee" was previously defined in part in subsection 15 of § 104.310, RSMo Supp. 1975, as follows:

Mr. Al F. Holmes, Jr.

'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor; . . . (Emphasis added.)

Thus, under the above statutory provision this office has previously held in Attorney General Opinion No. 39, Henry, 5/15/61 and Attorney General Opinion Letter No. 12, Noland, 5/26/69 that a member of the General Assembly who was covered by the retirement or benefit fund of the Public School Retirement System of Missouri created under §§ 169.010 to 160.130, RSMo 1959, either as a contributing member of the system or as a retired beneficiary of the fund, was excluded from the definition of employee in subsection 15 of § 104.310, RSMo 1959, and therefore could not become a member of the Missouri State Employees' Retirement System.

Subsection 15 of § 104.310 as set forth in Senate Bill No. 497 which changed the definition of "employee" was subsequently repealed and reenacted without change in Senate Bill No. 1 which was passed by the first regular session of the 80th General Assembly and signed by the Governor and became effective on September 28, 1979. See Laws of Missouri, 1979, p. 293. As a result, subsection 15 of § 104.310, RSMo Supp. 1979, provides in part as follows:

'Employee':

(a) Any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is currently accumulating benefits under some other retirement or benefit fund to which the state is a contributor; . . . (Emphasis added.)

Mr. Al F. Holmes, Jr.

With the foregoing legislative history in mind, there is authority to support the proposition that the primary rule in statutory construction is to ascertain and give effect to legislative intention. Missouri Pacific Railroad Co. v. Kuehle, 482 S.W.2d 505 (Mo. 1972). In determining the legislative intent, it has been pointed out that since the legislature is presumed to know the prior construction of the original act, an amendment substituting a new phrase for one previously construed, generally indicates that a different interpretation should be given the phrase since the interpretation given the old phrase no longer expresses the legislative will. Salitan v. Carter, Ealey and Dinwiddie, 332 S.W.2d 11 (Mo.App., K.C. 1960). In addition, there is authority for the proposition that a change in a statute is ordinarily intended to have some effect and the legislature will not be charged with having done a meaningless act. State ex rel. Thompson - Stearns - Roger v. Schaffner, 489 S.W.2d 207 (Mo. 1973). As a result, it is our view that the legislature intended that the phrase "but not including any employee who is currently accumulating benefits under some other retirement or benefit fund to which the state is a contributor" to refer to those individuals who are actively participating in other retirement plans to which the state is a contributor; such as the Public School Retirement System of Missouri. It is also our view that the phrase in question does not refer to those individuals who are only receiving retirement benefits from a retirement system to which the state is a contributor.

It is a well established principle of statutory construction that a statute should not be applied retroactively except where the legislature manifests a clear intent to do so or where the statute is procedural only and does not affect any substantive right of the parties. State ex rel. St. Louis - San Francisco Ry. Co. v. Buder, 515 S.W.2d 409 (Mo. banc 1974) and State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571 (Mo. banc 1962). Therefore, we view the provision in question as prospective only to be applied beginning January 1, 1979.

The conclusions we reach are applicable to both legislator members and other members of the system.

Therefore, it is our view that the member of the General Assembly to whom you refer would not be entitled to receive retirement benefits from the Missouri State Employees' Retirement System for the reason that the statute in question is not retroactive. Clearly, this member has not accumulated sufficient credits to qualify for retirement. Section 104.366, RSMo.

Mr. Al F. Holmes, Jr.

CONCLUSION

It is the opinion of this office that the provisions of subsection 15 of § 104.310, RSMo Supp. 1979, relating to the definition of "employee" insofar as the Missouri State Employees' Retirement System laws are concerned and providing that the word "employee" does not include any employee who is currently accumulating benefits under some other retirement or benefit fund to which the state is a contributor is not retroactive but is applicable beginning January 1, 1979. Such provisions allow certain persons to come within the definition of "employee" and to receive membership credit beginning January 1, 1979, if they are not accumulating benefits in another system to which the state is a contributor.

The foregoing opinion which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

February 29, 1980

OPINION LETTER NO. 16
(Answer by Letter-Wood)



Mr. David R. Freeman, Director
Department of Social Services
221 West High
Jefferson City, Missouri 65101

Dear Mr. Freeman:

Last April you submitted a request for our official opinion on the question whether the State of Missouri has a law of general applicability requiring stepparents to support their stepchildren to the same extent that natural or adoptive parents are required to support their children. The context of this question was the ability of the State of Missouri to comply with federal conditions relating to the Aid to Families with Dependent Children program of the Social Security Act, 42 U.S.C. §§ 601, et seq.

The Supreme Court of Missouri has recently answered this question in the affirmative. Bishop v. Missouri Division of Family Services, No. 61345, December 7, 1979, rehearing denied January 15, 1980 (copy enclosed).

We therefore will not issue an opinion on this question.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enc.

SAVINGS AND LOAN:

The Director of the Division of Savings and Loan Supervision may not recognize additional sources of revenue to that division for purposes of the director's computation of just and reasonable per diem charges, but these examination charges should approximate in amount the total of the actual per diem charges for all division personnel participating in the examination and other expenses incurred by the division on account of that examination, as specified in subsection 1 of § 369.324.

June 20, 1980

OPINION NO. 17

Mr. James R. Butler, Director
Department of Consumer Affairs,
Regulation and Licensing
Post Office Box 1157
Jefferson City, Missouri 65102



Dear Mr. Butler:

This is in response to your inquiry of this office, asking whether the Director of the Division of Savings and Loan Supervision may recognize other additional sources of revenue to the division for purposes of his computation or determination of the per diem examination charges that he believes to be just and reasonable, according to the provisions of § 369.324.1, RSMo. Section 369.324, RSMo, states:

1. Each association shall pay for each annual or special examination such amount as the director of the division of savings and loan supervision shall certify to be just and reasonable based upon per diem charges for all personnel participating in such examination, and expenses incurred on account of the examination. Payment shall be made to the director of revenue.

2. If the capital of an association shall at the end of any calendar year exceed the amount of capital upon which the association theretofore has paid an incorporation fee, an additional fee of five cents for each one hundred dollars of such additional capital shall be paid to the director of revenue within sixty days.

Mr. James R. Butler, Director

3. To meet the salaries and expenses of the division of savings and loan supervision, the funds for which are not otherwise provided, the director shall require every association under his supervision to pay to him its pro rata share thereof as estimated by the director for the ensuing year. The proportion to be assessed to each association shall be the proportion which its assets bears to the aggregate assets of all associations subject to supervision as shown by the latest reports of associations to the director but excluding from such computation assets consisting of real and tangible personal property situated without this state. The director shall notify each association by mail of the amount assessed against it. The association shall pay the amount assessed within twenty days after such notice.

4. All fees and charges imposed upon associations pursuant to the provisions of sections 369.010 to 369.369 shall be paid to the director of revenue and shall be paid into the state treasury. The director of revenue shall keep an accurate account of all such funds and shall at the request of the director report the total amount of such collections to him.

We understand that this opinion request was prepared in response to the text of Report No. 79-17, dated February 27, 1979, and issued by the Honorable James F. Antonio, C.P.A., Missouri State Auditor, which report found:

The Division of Savings and Loan Supervision, under statutory direction, charges savings and loan associations for each annual or special examination. Current procedures are to charge the associations \$70 per man-day required for the examination. This rate is apparently an arbitrary number that has been used since at least 1966.

* * *

Mr. James R. Butler, Director

The division has not done a study to determine the actual cost of an examination and, thus, has no basis upon which to determine if the current rate is a just and reasonable charge. It is obvious that when a cost study is performed, it will reveal that the current rate is much too low to recover all costs of the examinations as required by statute

* * *

WE RECOMMEND the division review its examination costs and establish charges that actually recover costs.

We also understand the position of the Division of Savings and Loan Supervision, that all of the subsections of § 369.324, RSMo, should be considered together, with all revenue received under that section available "[t]o meet the salaries and expenses of the division of savings and loan supervision" Thus, the argument has been made that all amounts received under subsection 2 should be considered in determining a "just and reasonable" charge for each annual or special examination under subsection 1. We have received the legal memoranda of both counsel in this matter.

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent, if possible, and to consider words used in the statute in their plain and ordinary meaning. State v. Kraus, 530 S.W.2d 684, 685 (Mo. banc 1975); State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512, 517 (Mo. 1974).

From our examination of the language used in § 369.324, we find no express or implied interrelationship between the fees for additional capital specified in subsection 2 and the annual or special examination charges described in subsection 1. Only the procedure for charging assessments, specified in subsection 3, takes into consideration the funds received from examination charges and additional capital fees, by limiting its application to those instances where the funds necessary to meet the salaries and expenses of the Division of Savings and Loan Supervision "are not otherwise provided." Thus, the section, when read as a whole, does not suggest that a just and reasonable rate for examination charges is dependent in any respect upon the fees for additional capital received under § 369.324.2.

Mr. James R. Butler, Director

Furthermore, the provisions of § 369.324.1 expressly limit the basis for determining what amount constitutes a just and reasonable examination charge to a consideration of "per diem charges for all personnel participating in such examination, and expenses incurred on account of the examination." Inasmuch as the statute has enumerated the criteria upon which the determination of just and reasonable examination charges is to be made, it must be construed as excluding from consideration all other possible considerations not expressly mentioned, including those fees and charges derived under other provisions of § 369.324. Gilotti v. Hamm-Singer Corp., 396 S.W.2d 711, 713 (Mo. 1965); Depoortere v. Commercial Credit Corp., 500 S.W.2d 724, 727 (Mo. App., Spr.D. 1973).

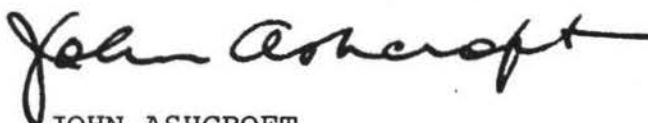
We also note, in this respect, that the director of the Division of Savings and Loan Supervision does not have complete discretion in establishing the amount or rate for examination charges. As construed in D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, 350 F.2d 753, 778 (D.C.Cir. 1965), "a 'just and reasonable' rate is one that assures that all the enterprise's legitimate expenses will be met; . . ." which in this instance are those expenses resulting from the per diem charges of all personnel participating in the examination and other expenses incurred on account of the examination. See also, New York Central Railroad Co. v. United States, 199 F.Supp. 955, 957 (S.D.N.Y. 1961), construing "just and reasonable" charges pursuant to statute. Thus, a just and reasonable charge for each annual or special examination is one which will, to the extent possible, recover the actual cost to the Division of Savings and Loan Supervision of that examination, as based upon the per diem charges for all participating personnel and expenses incurred therein.

CONCLUSION

It is the opinion of this office that the director of the Division of Savings and Loan Supervision may not recognize additional sources of revenue to that division for purposes of the director's computation of just and reasonable per diem charges, but these examination charges should approximate in amount the total of the actual per diem charges for all division personnel participating in the examination and other expenses incurred by the division on account of that examination, as specified in subsection 1 of § 369.324.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gregory W. Schroeder.

Very truly yours,



JOHN ASHCROFT
Attorney General

July 16, 1980

OPINION LETTER NO. 19

(Answer by Letter - Wood)

Mr. F. M. Wilson
Director, Dept. of Public Safety
621 East Capitol
Post Office Box 749
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This letter is in response to your question asking whether certain departmental components of the Department of Public Safety may be permitted to use either free or at cost part of the State Highway Patrol Headquarters Building, whose cost we understand was borne by the State Highway Department Fund. See §§ 226.200, RSMo, and 30(b) of Art. IV of the Missouri Constitution. The departmental components to which you refer are the office of the Director of Public Safety, the Division of Liquor Control, the Division of Water Safety, the Missouri Council on Criminal Justice, and the State Fire Marshal. It is not disputed that none of these departmental components are entitled to the direct use of state highway department funds. You also ask whether you may use an automobile paid for and maintained by state highway department funds, even though such use of the automobile would not be fully related to your functions relative to highway related activities.

We understand that your question does not involve the question of a sale or use of surplus property.

In State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. Banc 1973), the Missouri Supreme Court stated at l.c. 125:

. . . It is clear, however, that the people of Missouri, by Article IV, Section 30(b), and the General Assembly, by its enactment of Section 226.220, supra, interpretation of Article IV, Section 30(b), intended that no money be diverted from

Mr. F. M. Wilson

the state road fund and no other use be permitted of the fund except for the enumerated state highway purposes. Pohl v. State Highway Commission, 431 S.W.2d 99, 104-105, 106 (Mo. banc 1968). . . .

We also enclose our Opinions Nos. 85, dated June 7, 1974, to Lang, 23, dated February 1, 1972, to Graham, and 224, dated April 26, 1967, to Walsh, all of which expressed our view of the restrictions placed on the use of highway funds. We believe that such opinions are applicable to your questions and that the analogy is precise.

We conclude that such nonhighway related divisions of your department may not use space in the State Highway Patrol Headquarters Building, and that you may not use an automobile paid for and maintained out of the state highway department fund.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures

Att'y Gen. Op. No. 85,
Lang, 6/7/74
Att'y Gen. Op. No. 23,
Graham, 2/1/72
Att'y Gen. Op. No. 224,
Walsh, 4/26/67

VETERANS:
SOLDIERS AND SAILORS:
PUBLIC SCHOOL RETIREMENT SYSTEM:

The opinion of this office is as follows: 1. The provisions of subsection 3 of § 169.055 RSMo 1978, relating to the eligibility of a teacher to

receive military service credit for military duty in the Armed Forces of the United States of America during an emergency involving national defense have been preempted to the extent that they are in conflict with § 2024 of Chapter 43 of Title 38 of the United States Code Annotated. 2. A teacher is eligible to receive military service credit as a member of the Public School Retirement System of Missouri upon meeting all other statutory requirements of § 169.055 RSMo 1978.

April 21, 1980

OPINION NO. 20

Honorable J. H. Frappier
State Senator, 2nd District
Capitol Building, Room 418
Jefferson City, Missouri 65101



Dear Senator Frappier:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

May a member of the Missouri Public School Retirement System receive equivalent service credits in the retirement system, who after entering employment, serves in the armed forces of the United States on active duty or active duty for training?

If affirmative, what is the maximum amount of equivalent service credit that may be received? Indicate method of computation.

If affirmative, please indicate the responsibilities of the retirement system, the employer and the member in obtaining equivalent service credits.

Honorable J. H. Frappier

In addition to your opinion request, you have provided us with a letter from your constituent which provides in part as follows:

I am a resident of the Second District now living in Virginia while serving on active duty and need your assistance in obtaining relief from a provision of Missouri law that prevents my entitlement to military leave credits in the Missouri Public School Retirement System. A review of §2021, Chapter 43, Title 38, USC, indicates that retirement credits must be provided for time served on active duty when veterans are reinstated with their former employers.

In December 1975, after six years as an administrator with the public schools of Missouri, I was offered a special tour of active duty at Headquarters, Department of the Army, Washington, D. C. The school district granted a military leave of absence and I plan to return in December this year. § 2021(b), Title 38 provides that it is the sense of Congress that reinstatement shall include the seniority, status, pay and benefits that would have been enjoyed if the employee had been in continuous employment. It is clear that this provision applies to employers of the states and political subdivisions (§ 2021(a)).

I communicated with the Public School Retirement System unsuccessfully to date to obtain military leave credits for the four years' service that will accrue upon my return. If I had been in continuous employment with the school district I would have been entitled to participate in the retirement system since it is mandatory for all certificated employees of the public schools of Missouri.

In connection with the above, subsection 3 of § 169.055 RSMo 1978, provides as follows:

Honorable J. H. Frappier

3. A member who enters the service of the armed forces of the United States of America during an emergency involving national defense, provided he is a teacher in a district included in the system at the time he is inducted, enlisted, or called to active duty, and who without voluntary reenlistment after the cessation of such national emergency is reemployed as a teacher within one year after discharge from such service, or within one year of said date plus time spent as a student in a standard college or university in further preparation for service as a public school employee, shall not be subject to the provisions of subsection 4 of section 169.050 with regard to termination of membership because of unemployment as a teacher due to his actual service in the armed forces of the United States and such subsequent period spent as a student. Such a member may elect within five years after his reemployment, or before July 1, 1958, and prior to retirement, whichever is later, to purchase membership service credit with a rate of compensation the same as the annual salary rate at which he was employed at the time of his induction for the period of service in the armed forces of the United States. The purchase shall be effected by the member's paying to the retirement system with interest the amount he would have contributed thereto had he been teaching during the period for which he is electing to purchase credit, and had his compensation during such period been the same as the annual salary at the time of his induction, and had sections 169.010 to 169.130 as in effect at date of purchase been in effect at that time. The payment shall be made over a period of not longer than five years, measured from the date of election, and with interest on the unpaid balance.

Thus, under the above statutory provision, a member of the Retirement System who enters the service of the Armed Forces of the United States of America during an emergency involving the national defense, provided he is a teacher in a district included in the System at the time he is inducted, enlisted, or called to

Honorable J. H. Frappier

active duty, and who without voluntary reenlistment after the cessation of such national emergency is reemployed as a teacher within one year after discharge from such service, or within one year of said date plus time spent as a student in a standard college or university in further preparation for service as a public school employee, shall not be subject to the provisions of subsection 4 of § 169.050, RSMo 1978, with regard to termination of membership because of unemployment as a teacher due to his actual service in the Armed Forces of the United States and such subsequent period spent as a teacher. The member may also purchase retirement credit for the military service.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (P.L. 93-508; 88 Stat. 1578) was enacted into law over presidential veto on December 4, 1974. Section 404 of that Act, effective upon enactment, recodified the then-existing law on veterans' reemployment rights into a new Chapter 43 of Title 38 of the United States Code. Among other things, the legislation provided substantive amendments which entitled employees of state and political subdivisions thereof, as well as employees of the United States Postal Service, to the same reemployment rights of federal employees and those of private employers. Section 2024 of Chapter 43, entitled "Rights of Persons Who Enlist or are Called to Active Duty; Reserves" of the Veterans' Reemployment Act (hereinafter referred to as Act) is found in Title 38 of the United States Code Annotated. Section 2024 reads in part as follows:

(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act [50 USCS Appx §§ 451-473] (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in

Honorable J. H. Frappier

excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter [38 USCS §§ 2021-2026] in the case of persons inducted under the provisions of the Military Selective Service Act [50 USCS Appx §§ 451-473] (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by

Honorable J. H. Frappier

such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than three consecutive months shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter [38 USCS §§ 2021-2026] for persons inducted under the provisions of the Military Selective Service Act [50 USCS Appx §§ 451-473] (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title 5 [5 USCS § 101 et seq.] relating to veterans and other preference eligibles.

Honorable J. H. Frappier

As a result of the above, subsection (a) of Section 2024 of the Act provides protection to enlistees; subsection (b)(1) provides protection to persons called to active duty, other than for the purpose of determining physical fitness and other than for training; subsection (b)(2) provides reemployment protection to reserve members who voluntarily or involuntarily enter active duty; and subsection (c) grants reemployment rights to reservists who serve an initial period of active duty for training for not less than three consecutive months.

The reemployment rights program is administered by the Labor-Management Services Administration (LMSA) in the Department of Labor and within LMSA, specifically by the office of Veterans' Reemployment Rights (OVRP). See 38 U.S.C.A., § 2025. In this regard, it has been pointed out that according to the Office of OVRP of the Department of Labor, a reemployed veteran's military service time must be counted toward his continuous service with his employer for the purpose of determining his eligibility for retirement benefits. Thus, where retirement annuity or pension is a right or benefit maturing after the veteran's reemployment, the veteran's military service may not be treated as if he were on leave of absence, but must be counted as if he had remained continuously employed rather than absent for military service except with certain exceptions which are not here applicable. Further, where the pension plan requires a certain number of years of service with the employer before the employee can become a participant or before vesting occurs, or before the employee can retire with annuity rights, the veteran's military service time must be counted toward the fulfillment of these time requirements. See, 1 FRES, Job Discrimination, § 7:32, p. 48.

As a result of the foregoing discussion of state and federal legislation, it is submitted that the first issue for consideration is whether or not subsection 3 of § 169.050, RSMo 1978, is in an irreconcilable conflict with § 2024 of the federal Act (38 U.S.C.A., § 2021, et seq.). When such conflicts exist it is a fundamental principle of constitutional law based on the supremacy clause of the United States Constitution (Art. VI, Clause 2) that the federal act will prevail over the state act to the extent that it preempts it. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (1924); Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5 (1958).

I.

PREEMPTION ANALYSIS

The Supreme Court of the United States has indicated that in a preemption analysis it is necessary to find a congressional

Honorable J. H. Frappier

intent to preemptively occupy the field or the existence of a true and irreconcilable conflict between state and federal law. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 83 S.Ct. 1210, 10 L.Ed. 2d 248 (1963). In this regard, we have previously pointed out in our discussion of the federal legislation, that substantive amendments were added in 1974 which entitled employees of state and political subdivisions thereof to the same reemployment rights of federal employees and those of private employers. 38 U.S.C.A., § 2021. The reasons for the 1974 amendments were stated in the senate report:

The Military Selection Service Act of 1967 declares it to be the sense of Congress that States and their subdivisions extend to veterans the same reemployment rights as do [sic] the Federal Government or private industry under present law. The provision now relating to State and local governments, however, is not binding under the law and, as a consequence, many returning veterans have found that their jobs in State or local government no longer exist. Furthermore, because these stated reemployment rights are not mandatory upon State and local governments, these veterans lose all benefits which would have accrued to them had they not entered military service.

* * *

Although a number of States have enacted legislation providing reemployment rights to veterans, the coverage, the rights provided, and the availability of enforcement machinery all vary considerably from state to state. Also some state and local jurisdictions have demonstrated a reluctance, and even an unwillingness to reemploy the veteran. S.Rep. No. 93-907, 93rd Cong., 2d Sess. 109-110 (1974).

Thus, in view of the above legislative history, it seems clear that the Congress of the United States intended to preemptively occupy the field of veteran's reemployment rights.

Further, in Alabama Power Company v. Davis, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed. 2d 595 (1977), one Davis became a permanent employee of the Alabama Power Company on August 16, 1936, and continued to work until March 18, 1943, when he left to enter the military. After serving the military for thirty months, he

Honorable J. H. Frappier

resumed his position with Alabama Power, where he worked until he retired on June 1, 1971. Davis received credit under the company pension plan for his service from August 16, 1937, until the date of his retirement, with the exception of the time he spent in the military and some time spent on strike. Davis claimed that § 2021 of the Act required Alabama Power to give him credit toward his pension for his period of military service. Thereafter, he sued to vindicate that asserted right. On certiorari, the United States Supreme Court affirmed. In an opinion expressing the unanimous view of the court, it was held that under § 2021 of the Act, the employee was entitled to credit towards his pension under his employer's pension plan for the time of his military service, since the employee would almost certainly have accumulated accredited employment service for the time of his military tour had he remained continuously employed, in view of his work history before and after his tour, and since payments made under the pension plan constituted a reward for length of service rather than compensation for services.

Also in Peel v. Florida Department of Transportation, 443 F. Supp. 451 (N.D. Fla. 1977), an action was brought by an employee of the Florida Department of Transportation to obtain certain rights under the Veterans' Reemployment Rights Act. The federal district court held that the plaintiff should have been granted his request for military leave of absence from his employment with the defendant Florida Department of Transportation when the request was made pursuant to his orders for full time training duty as a member of the National Guard, regardless of certain restrictions imposed by a Florida statute. The court further held that the plaintiff was entitled upon his return to reemployment by the defendant Florida Department of Transportation with such seniority, status and salary as if he had not been absent. There were numerous issues discussed in the case, one of which, was whether or not the state statute has been preempted by the federal act. In this regard, the federal district court made the following comments at pages 459 and 460:

V. The Supremacy Clause and Preemption

[10-11] The plenary power accorded Congress pursuant to Art. I, § 8, cl. 12 preempts states from enacting legislation limiting or restricting such Congressional power. Preemption issues focus on the role of the Supremacy Clause of the Constitution. Art. VI, § 2. In the case sub judice, the issue boils down to whether F.S. § 115.07

Honorable J. H. Frappier

stands as an obstacle to the accomplishment and objectives of the VRR Act. Section 115.07 of the Florida Statutes limits plaintiff's military leave to 17 days annually; this stands in direct opposition to the rights granted plaintiff under the VRR Act. The United States Supreme Court has announced the following test for preemption:

The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field; not whether they are aimed at similar or different objectives. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed. 2d 248, 256-257, reh. den, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed. 2d 1082 (1963).

For purposes of the case sub judice, the nature of the subject matter in the VRR Act and Congress' explicit design for uniform enforcement among the States in § 2022 mandate the displacement of F.S. 115.07. The reemployment rights granted in the VRR Act are subject to exclusive federal regulation in order to achieve a uniformity vital to our national interests.

As a result, the Florida statute was preempted by the federal legislation.

Subsequently, in Schaller v. Board of Education of Elmwood Local School District, 449 F. Supp. 30 (N.D. Ohio 1978), a teacher who had voluntarily left the employment of a local school district in Ohio to enlist in the Armed Services, and who, upon return therefrom, was not timely reinstated to the same position or one of like seniority or status, brought an action under the Veterans' Reemployment Act. In discussing the federal legislation, the following comment was made by the court at page 33:

[5,6] Plaintiff here is a former employee of a state agency. However, the principles of comity and federalism which underlie the relationship between

Honorable J. H. Frappier

the states and the national government have less significance in the area of Congress' authority to raise and support armies. U.S. Const. art. I, § 8, cl. 12; Peel v. Florida Department of Transportation, supra; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed 2d 644 (1963); Johnson v. Powell, 414 F. 2d 1060 (5th Cir. 1969). While, for instance, minimum wage and overtime pay provisions of the Fair Labor Standards Act could not be enforced against the states, National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976), the responsibility of the national government to raise and support the military places the national government in a special position vis a vis the states. The war powers delegated to the national government give Congress broad powers which should not be limited or restricted unnecessarily. Peel v. Florida Department of Transportation, supra; Simmons v. United States, 406 F. 2d 456 (5th Cir. 1969); St. John's River Shipbuilding Co. v. Adams, 164 F. 2d 1012 (5th Cir. 1947). Thus, this Court finds that the defendant, which has not asserted to the contrary, is subject to the commands of the statute.

Therefore, the court ruled in favor of the teacher and among other matters, held that the local school district was subject to the commands of federal legislation guaranteeing veterans that the job they had before they entered the military would be available to them upon their return.

As a result of the above, it is our view that the Congress of the United States intended to preemptively occupy the field of veterans reemployment rights. In addition, it is submitted that the conflict between subsection 3 of § 169.055 RSMo 1978 and § 2024 of the federal legislation is readily apparent. Subsection 3 of § 169.055, RSMo 1978, provides in part that a member of the Retirement System shall be entitled to certain rights who enters the service of the Armed Forces of the United States during an emergency involving the national defense. However, § 2024 of the federal statutes expresses no such prohibition against veterans' reemployment rights. Further, the federal act guar-

Honorable J. H. Frappier

antees certain reemployment rights which all states must uniformly comply with. The states are free to establish additional rights or protections for state or local employees, but they are not free to impose restrictions on the reemployment rights granted by the federal legislation. Peel v. Florida Department of Transportation, supra. Therefore, it is our opinion that the provisions of subsection 3 of § 169.055, RSMo 1978, have been preempted by the provisions of § 2024 of the Veterans' Reemployment Rights Act to the extent that they are in conflict with the federal legislation.

II.

DISCUSSION OF MILITARY SERVICE CREDIT UNDER § 169.055, RSMo 1978

We will next consider the issue raised in your opinion request as to the maximum amount of military service credit and the method of computation under the provisions of subsection 3 of § 169.055, RSMo 1978. In this regard, omitting the provision relating to membership in the Armed Forces during an emergency involving national defense, a member of the Retirement System under this statutory provision may purchase retirement credit for time spent in the Armed Forces after July 1, 1946. In order to qualify for such a purchase, the member must have been teaching in a district included in the Retirement System at the time of his entry into active military duty and must return to such teaching following separation from the Armed Forces. The return to teaching must be within one year of the date of separation from active duty or within one year of that date plus time spent in a full time attendance at an educational institution. The election to purchase military credit must be made within five years of the date or reentry into teaching following military service.

Further, the cost of military credit is based upon the salary rate the member was earning as a teacher at the time of his induction into military service. The contribution for the credit is the rate in effect at the time of application for purchase. The member is required to pay the contributions and interest charges within five years of the date of application to purchase. Lastly, military credit does not require a matching employer contribution, but only member contributions and interest.

It should be noted that the above provisions of subsection 3 of § 169.055, RSMo 1978, are not in conflict with the federal legislation. Thus, it has been pointed out by the Department of Labor that where the veteran in order to have achieved full status in a contributory pension plan had he remained present, would have had to make contributions of his own, he must make those

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employee contributions after his return as increased by interest, dividends, capital gains, etc., in the meantime, if he is to qualify for the full pension plan status to which he is otherwise entitled by law. See Department of Labor, Veterans' Reemployment Rights Handbook, 97 (1970).

CONCLUSION

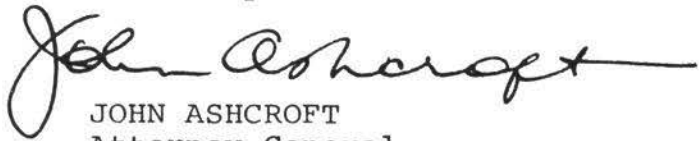
The opinion of this office is as follows:

1. The provisions of subsection 3 of § 169.055 RSMo 1978, relating to the eligibility of a teacher to receive military service credit for military duty in the Armed Forces of the United States of America during an emergency involving national defense have been preempted to the extent that they are in conflict with § 2024 of Chapter 43 of Title 38 of the United States Code Annotated.

2. A teacher is eligible to receive military service credit as a member of the Public School Retirement System of Missouri upon meeting all other statutory requirements of § 169.055 RSMo 1978.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Sincerely,

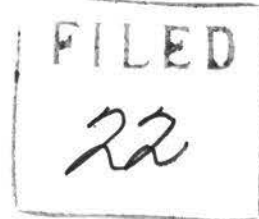
A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

July 24, 1980

OPINION LETTER NO. 22
(Answer by Letter-Allen)

The Honorable Carl Muckler
Representative, District 56
Room 109C, Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Muckler:

This letter is in response to your request for an opinion asking whether Chapter 34, the state purchasing law, requires that professional services contracts be bid through the commissioner of administration.

In our Opinion No. 163, dated August 22, 1975, to Nielsen, we concluded that the phrase "contractual services" as used in § 34.010, RSMo, includes insurance purchased by the state and therefore that such insurance must be purchased pursuant to the provisions of Chapter 34, except as otherwise provided by law. We enclose a copy of that opinion.

It is our understanding that Opinion No. 163-1975 may have been misunderstood to apply to physicians, attorneys and expert witnesses who are part of an attorney's case.

At the time of the enactment of the purchasing law in 1933 the practice of medicine and the practice of law were considered the historical learned professions and were not subject to bid. It seems clear that the legislature in enacting such law did not intend to include these historic learned professions. While such professional services are now bid in a number of contexts there has been no change in the statutes since they were first enacted to indicate that such professional services are to be included within the requirements of the purchasing law. Accordingly, we conclude that such services are not subject to the requirements that they be bid under the purchasing law.

The Honorable Carl Muckler

The expert witness services to which we refer are of a particularly unique character because such expert witnesses are a part of an attorney's case for which the attorney bears the professional responsibility. As a consequence, it is our view that the services of such expert witnesses were not and are not now subject to the requirements of the purchasing law.

It is our view that professions and services other than those of physicians, attorneys and such expert witnesses are subject to the requirements of the purchasing law.

Although we have concluded that services of physicians, attorneys and such expert witnesses are not included within the provisions of the purchasing law, Chapter 34, we wish to make it clear that there is nothing to prohibit the bidding for such services if the officer requiring the service desires such bids.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", written in a cursive style.

JOHN ASHCROFT
Attorney General

Enclosure

Att'y Gen. Op. 163-1975

January 31, 1980

OPINION LETTER NO. 24
(Answer by Letter-Klaffenbach)

The Honorable Richard J. Fredrick
Director, Division of Insurance
515 East High Street
Jefferson City, Missouri 65101



Dear Mr. Fredrick:

This letter is in response to your questions asking whether the director of the Missouri Division of Insurance has authority to disclose to private persons the names and addresses of persons who obtain property insurance through the Missouri Property Insurance Placement Program, Sections 379.810, et seq., RSMo, for the purpose of notifying such persons that insurance may be available in the voluntary market.

It is our understanding that the records about which you inquire are not records of the Division of Insurance but are records of the private association of insurance companies involved in the plan. It is also our understanding that it is doubtful that there is presently any reason for the director of the Division of Insurance to request such records. Apparently the only way the director of the Division of Insurance could obtain such records would be to request them for the sole purpose of making such records available to the public. It is also our understanding that the attorneys representing the insurance companies involved or the managing officers of such association have taken the position that such records may not legally be made available to the public although they have declined to provide us with their views.

Under these circumstances, we conclude that such records are not public records and that the director of the Division of

The Honorable Richard J. Fredrick

Insurance has no authority to obtain these records solely for the purpose of making such records public.

Very truly yours,

JOHN ASHCROFT
Attorney General

May 14, 1980

OPINION LETTER NO. 25
(Answer by Letter-Klaffenbach)

The Honorable Stephen Bradford
Commissioner of Administration
Office of Administration
Post Office Box 809
Jefferson City, Missouri 65102



Dear Mr. Bradford:

This letter is in response to your question asking:

Is the State of Missouri liable for the clerk's fees set forth in Section 483.530 in subsections 3 and 4 of House Bill No. 1634 as a part of costs in criminal cases for which the State might be liable pursuant to Section 550.020 and 550.040, RSMo. 1978 and to be paid from appropriations to the Office of Administration for payment of costs in criminal cases? If the State of Missouri is not liable for the clerk's fees set forth in Section 483.530, who is?

Section 483.530, RSMo, provides in pertinent part:

The clerk who is responsible for collecting fees under the provisions of section 483.550 shall charge and collect the following fees:

.

(3) In felony cases, the sum of \$10 in each preliminary hearing;

(4) In felony cases, the sum of \$15 for each information or indictment filed;

.

The Honorable Stephen Bradford

Section 550.020, RSMo, provides in pertinent part:

1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant.

Section 550.040, RSMo, provides:

In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law.

Section 550.140, RSMo, provides:

The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and

The Honorable Stephen Bradford

if the state or county shall be liable under the provisions of this chapter for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor.

It has been said that costs which are definite and fixed by law are required by statute to be taxed in the first instance by the clerk of the court, a purely ministerial duty. In re Thomasson, 119 S.W.2d 433 (St.L.Ct.App. 1938).

It is our view that the above statutory provisions indicate that the costs about which you inquire may, in the proper instance, be taxed against the state under §§ 550.020 or 550.040.

Very truly yours,

JOHN ASHCROFT
Attorney General

SCHOOLS:

Section 167.241, RSMo Supp. 1979, does not authorize a school board that does not maintain an approved high school offering work through the twelfth grade to designate an unapproved high school for attendance by resident pupils who have completed the work of the highest grade offered in the schools of the district, both by reason of § 167.131, RSMo 1978, and the provisions of § 167.241, RSMo Supp. 1979, requiring the board only to choose from high schools that meet minimum classification standards adopted by the State Board of Education.

October 21, 1980

OPINION NO. 26

Dr. Arthur L. Mallory
Commissioner
Department of Elementary and
Secondary Education
6th Floor, Jefferson State Office Building
Jefferson City, MO 65101

Dear Dr. Mallory:

Pursuant to § 27.040, RSMo 1978, you have requested this office's formal opinion to the following question:

The 80th General Assembly, first regular session, enacted SB 318, which was signed into law by the Governor to become effective September 28, 1979. Section 167.241, RSMo, as revised by this Act reads as follows:

Transportation for pupils whose tuition the district of residence is required to pay by section 167.131 or who are assigned as provided in section 167.121 shall be provided by the district of residence; however, in the case of pupils covered by section 167.131, the district of residence shall be required to provide transportation only to high schools meeting minimum classification standards adopted by the state board of education and those high schools designated by the board of education of the district of residence.

Dr. Arthur L. Mallory

Does this statute, as revised, authorize a school board "that does not maintain an approved high school offering work through the twelfth grade" to designate an unapproved high school to which pupils will be transported at the expense of the district of residence and thereby avoid paying transportation costs for high school students?

Paragraph 1 of § 167.131, RSMo 1978, states as follows:

1. The board of education of each district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each pupil resident therein who has completed the work of the highest grade offered in the schools of the district and who attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered.

Therefore, pursuant to the provisions of § 167.131, a board of education of a district without a high school or without an approved high school must pay the tuition of resident pupils who attend the specified types of approved high schools.

The issue presented in your question is whether a school district can designate an unapproved high school and thereby avoid transportation costs. Section 167.241, RSMo Supp. 1979, states:

Transportation for pupils whose tuition the district of residence is required to pay by section 167.131 or who are assigned as provided in section 167.121 shall be provided by the district of residence; however, in the case of pupils covered by section 167.131, the district of residence shall be required to provide transportation only to high schools meeting minimum classification standards adopted by the state board of education and those high schools designated by the board of education of the district of residence.

As previously stated, § 167.131 only requires payment of tuition to approved high schools. The however clause in § 167.241 merely

Dr. Arthur L. Mallory

specifies those approved high schools under § 167.131 attendance at which requires the district of residence to provide transportation.

Also significant in the however clause of § 167.241 is the use of the conjunction "and," reading:

[T]he district of residence shall be required to provide transportation only to high schools meeting minimum classification standards adopted by the state board of education and those high schools designated by the board of education of the district of residence. (Emphasis added)

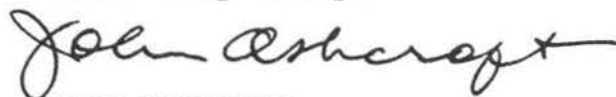
The conjunction "and" means that two phrases must be considered together. A conjunction that connects words and phrases expresses the idea that the latter is to be added to or taken along with the first. Black's Law Dictionary 112 (4th ed. Rev. 1968). Therefore, in construing the however clause of § 167.241, in the case of pupils covered by § 167.131, the district of residence may only designate a high school meeting minimum classification standards to which they must provide transportation.

CONCLUSION

It is the opinion of this office that § 167.241, RSMo Supp. 1979, does not authorize a school board that does not maintain an approved high school offering work through the twelfth grade to designate an unapproved high school for attendance by resident pupils who have completed the work of the highest grade offered in the schools of the district, both by reason of § 167.131, RSMo 1978, and the provisions of § 167.241, RSMo Supp. 1979, requiring the board only to choose from high schools that meet minimum classification standards adopted by the State Board of Education.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leslie Ann Schneider.

Yours very truly,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

March 4, 1980

OPINION LETTER NO. 28

The Honorable Edward E. Ottinger
State Representative
District 101
State Capitol Building, Room 203D
Jefferson City, Missouri 65101

Dear Representative Ottinger:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

Do the teachers as well as nonteachers have the right to vote jointly for the election of their four trustees? Or, should the teachers vote for their two trustees and the nonteachers for their two trustees. In other words, should their elections be held separately?

In your opinion request, you indicate that at the present time when an election for a trustee of the Public School Retirement System of the City of St. Louis occurs, both teachers and nonteachers who are active members of the Retirement System vote for said trustee. In this regard, you indicate that some of the members feel that this is not in accordance with subsection 2 of § 169.450 RSMo 1978 and that they believe that only teachers should vote for the two teacher trustees and only nonteachers should vote for the two nonteacher trustees.

In connection with the above, § 169.450 RSMo 1978 provides for the election of trustees of the Public School Retirement System of St. Louis. Subsection 2 of § 169.450 supra reads as follows:

(2) Four trustees to be elected for terms of four years by and from the active members of the retirement system who shall hold office as trustees only while active members; provided, however, that the terms of office of the first four members so elected shall begin immediately upon their election and shall expire one, two, three and four years from the date the retirement system becomes operative respectively; and provided further, that not more than two of such persons shall be teachers and two shall be nonteachers; .

. . .

It should be noted that the term "active member" is defined in subsection 14a of § 169.410 RSMo 1978 as "a member who is an employee." Further, the term "employee" is defined in subsection 12 of § 169.410 RSMo 1978 as "any person regularly employed by the board of education or by the board of trustees. In case of doubt as to whether any person is an employee, the decision of the employing board shall be final and conclusive." Therefore, upon due consideration, it is our view that the provisions of subsection 2 of § 169.450 supra relating to the election of trustees are plain and unambiguous and that teachers as well as nonteachers have the right to vote for the election of trustees and that separate elections are not required.

In conclusion, it is our opinion that teachers as well as nonteachers have the right to vote for the election of trustees under the provisions of subsection 2 of § 169.450 RSMo 1978 and that separate elections are not required at which only teachers would vote for the two teacher trustees and only nonteachers would vote for the two nonteacher trustees.

Very truly yours,



JOHN ASHCROFT
Attorney General

February 14, 1980

OPINION LETTER NO. 29
(Answer by Letter-Green)

Honorable Alex J. Fazzino
Representative, 22nd District
1809 Pendleton
Kansas City, Missouri 64106



Dear Mr. Fazzino:

This official opinion is issued in response to your inquiry which asks whether, under Section 571.105, RSMo 1978, a dealer of automatic weapons, who has been duly licensed by the federal government to possess and transfer automatic weapons to law enforcement agencies, is precluded as a Missouri resident from possessing such weapons and doing business in the State of Missouri.

Section 571.105 states:

It shall be unlawful for any person to sell, deliver, transport, or have in actual possession or control any machine gun, or assist in, or cause the same to be done. . . . provided, that nothing in this section shall prohibit the sale, delivery, or transportation to police departments or members thereof, sheriffs, city marshals or the military or naval forces of this state or of the United States, or the possession and transportation of such machine guns, for official use by the above named officers and military and naval forces in the discharge of their duties.

Honorable Alex J. Fazzino

It is a basic rule of statutory construction that one must seek the intention of the lawmakers and do so from the words used in the statute, if possible, ascribing to the language used its plain and rational meaning and giving significance to every word, phrase, sentence and part thereof, if in keeping with that intent. State ex rel. Jones v. Ralston Purina Company, 358 S.W.2d 772, 777 (Mo. banc 1962). Ordinarily, the word "provided" introduces a condition or exception and is often synonymous with "if." State ex inf. McKittrick v. Murphy, 347 Mo. 484, 148 S.W.2d 527, 532 (banc 1941). In ordinary usage, the words "provided, that" denote a limitation upon, exception to, or requirement in addition to that which has gone before. Carr v. Burke, 333 Mass. 365, 130 N.E.2d 687, 688 (1955).

Following these rules of statutory construction, Section 571.105 may be read as prohibiting the sale, delivery, transportation, or actual possession or control of a machine gun in the State of Missouri by anyone except persons selling, delivering, or transporting the same to police departments or other authorized agencies or persons. The words "provided, that" appearing in the statute carve out an exception from the statute's general prohibition against the possession of such weapons.

Therefore, it is our view that Section 571.105 does not prohibit the possession of machine guns for the purpose of sale, delivery or transportation to police departments or members thereof, sheriffs, city marshals or the military or naval forces of this state or of the United States.

Sincerely,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

September 24, 1980

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

OPINION LETTER NO. 30

The Honorable Dotty Doll
State Representative, 29th District
5417 Harrison
Kansas City, Missouri 64110

Dear Representative Doll:

This opinion is in response to your request for a ruling on the following questions:

1. Do the provisions of § 177.091.4 apply to the sale of property by urban school districts or does § 177.141.1(3) leave the method of sale of property by an urban district within the board's discretion?
2. Can the Kansas City School District lease for a long-term duration vacant buildings and/or the ground on which they stand to private industry?

Section 177.141 applies to "urban districts." Section 171.091 applies to "six-director districts." However, pursuant to § 160.011(11), a "six-director district" is defined as "any school district which has six directors and includes urban districts regardless of the number of directors an urban district may have." Furthermore, § 162.461, provides that urban districts are ". . . governed by the same general laws as other six-director school districts, except as otherwise provided by law."

A well-known rule of statutory construction is that statutes relating to the same subject matter must be read harmoniously; that "provisions of one having special application to a particular

subject will be deemed a qualification to another statute general in its terms." City of Raytown v. Danforth, 560 S.W.2d 846 (Mo. banc 1977). It is the opinion of this office that § 177.091 is applicable to an urban school district except to the extent that it is contradicted by a specific provision in § 177.141. Because of the dual application of § 177.141 and § 177.091 to urban school districts, the sale of property by an urban school district requires, as per § 177.141, an affirmative vote to sell such property by two-thirds rather than a majority vote prescribed in § 177.091. In addition, the remaining provisions of § 177.091 are applicable and must be complied with by urban school districts selling property.

The second question you present in your opinion request concerns whether the Kansas City School District can lease property for a long-term duration to private industry. Section 177.091, RSMo 1978, specifically allows the school district to sell its property when it is no longer required for the use of its district. In that a school district has the power to sell its property, it follows that the school districts likewise have the power to allow the use of the premises under its control through the form of a lease. 51(C), C.J.S., "Landlord and Tenant," §§ 252-253. Therefore, when the school property is no longer required for the use of the district, the school board may lease such property to private industry.

The length of the term of the lease will also affect its legality. As a general proposition, a school board has reasonable discretion to lease school property during the time it is not used for school purposes, "but where such lease is for an unreasonable period of time, it will not be upheld." 68 Am.Jur.2d "Schools", § 77.

The question then becomes what is a reasonable length of time. Although there are no Missouri cases on this subject, a West Virginia court in Madachy v. Huntington Horse Show Assoc., 119 W.Va. 58, 92 S.E. 128 (1937), held that a county board of education could not lease property acquired for school purposes for a term of twenty years, where the lease contained no reserved right to terminate within the term except for specific limited reasons and under no contingency could the lease be terminated for a period of three years and five months subsequent to the lease's execution.

Therefore, it is the opinion of this office that the provisions contained in § 177.091.4 apply to the sale of property by urban school districts except to the extent directly contradicted by § 177.141 with respect to a two-thirds affirmative vote. It is

The Honorable Dotty Doll

also the opinion of this office that the Kansas City School District may lease vacant buildings and/or the ground on which they stand to private industry if (1) there is no need for the property in the maintenance and operation of the school district, and (2) the length of the lease's duration is reasonable.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name.

JOHN ASHCROFT
Attorney General

COUNTIES:
COUNTY JUDGES:
MILEAGE:

County court judges of second class counties are not authorized to charge the county mileage for travel from their home to the courthouse for meetings of the court.

January 21, 1980

OPINION NO. 33

The Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County Courthouse
Fulton, Missouri 65251



Dear Mr. Hamilton:

This opinion is in response to your question asking:

Are County Judges of Second Class Counties authorized to charge the county mileage for travel from their home to the courthouse for meetings of Court under the provisions of Section 49.100, RSMo 1978?

You also state:

On January 1, 1979, Callaway County moved from third class county status to second class county status. The County Court Judges had always received mileage for travel from their homes to meetings of the County Court. That was under the provisions of Section 49.110, RSMo. That particular provision specifically authorizes reimbursement 'for each mile necessarily traveled in going to and returning from the place of holding court'. It has now come to our attention that Section 49.100, RSMo 1978, contains different language and simply indicates that reimbursement is authorized 'for each mile actually and necessarily traveled in performance of their official duties'.

The Honorable C. E. Hamilton, Jr.

Section § 49.100 with respect to judges of the county court in counties of the second class provides that they shall receive ten cents per mile for each mile actually and necessarily traveled in the performance of their official duties. On the other hand, § 49.110, RSMo, with respect to judges of the county court in third class counties provides that they shall receive fifteen cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim.

In Op. Att'y Gen. No. 89, Tomlinson, May 8, 1951, this office considered the provisions of § 49.110, RSMo 1949, which at that time provided only for five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. In that opinion we reached a conclusion that such provisions and similar provisions contained in § 49.120, RSMo 1949, relative to county judges of counties of the fourth class were to be literally interpreted and allowed mileage only for travel to and returning from the place of holding county court as provided. Of course since that opinion was written, the provisions of §§ 49.110 and 49.120 have been amended to include "all other necessary travel on official business in the personal automobile of the judge presenting the claim." We have not enclosed a copy of that opinion because the provisions of the sections cited have been amended and the opinion is no longer appropriate. However, such opinion indicates that there is a clear difference between mileage authorization for the purpose of attending court and mileage authorization for necessary travel on official business.

Likewise this office concluded in Op. Att'y Gen. No. 50, Henry, March 5, 1964, that unless the legislature has specifically included in the allowable expenses of public assessors the cost of traveling from their homes to the place where their work is regularly performed such expenses cannot be held to be a legitimate public charge. We have not included a copy of that opinion because it is not otherwise relevant here.

The Honorable C. E. Hamilton, Jr.

The holding in the latter opinion was cited with approval and amplified in Op. Att'y Gen. No. 350 & 351, Holman, as amended December 31, 1975, copy enclosed, which is self-explanatory.

CONCLUSION

It is the opinion of this office that county court judges of second class counties are not authorized to charge the county mileage for travel from their home to the courthouse for meetings of the court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive style with a prominent "J" and "A".

JOHN ASHCROFT
Attorney General

Enclosure

March 27, 1980

OPINION LETTER NO. 34
(Answer by Letter-Dean)

Honorable Flavel J. Butts
Representative, 132nd District
Room 106A, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Butts:

This is in response to your opinion request in which you inquire as to whether a school board may invest surplus district funds in a bank outside the district and county under Section 165.051, RSMo, even though there are interested and qualified banks within the district.

In preparing this reply we have reviewed Opinion No. 291, rendered September 24, 1974, to Representative Russell Brockfeld. We believe that opinion continues to be correct and that it is controlling in this instance.

That opinion held:

. . . a school district may invest surplus funds in certificates of deposit . . . only in a bank in the county in which the school district is located, except where the conditions set out in Section 110.040 prevail.

A copy of the complete opinion is enclosed for your use.

Honorable Flavel J. Butts

Arguments have been presented to us about the validity of Opinion No. 291 of 1974. We note the sections in question, 165.051 and 165.201 to 165.291, RSMo, have not been significantly altered by the legislature since the opinion was issued. Had the legislature believed the opinion to be incorrect, the statute in question could have been changed. Since no legislative action has taken place we believe it inappropriate to now withdraw the opinion and reverse our position. We believe the research and reasoning that lead to Opinion No. 291 of 1974 is still valid.

We conclude, therefore, that school districts are prohibited from investing surplus funds in banking institutions outside the county in which the district is located except under the circumstances set forth in Section 110.040, RSMo.

Sincerely,

JOHN ASHCROFT
Attorney General

Enc: Op. No. 291
Brockfeld, 9/24/74

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

March 17, 1980

OPINION LETTER NO. 35
(Answered by Letter-Shipman)

Honorable Roger B. Wilson
Senator, 19th District
603 Bluff Dale Drive
Columbia, Missouri 65201



Dear Senator Wilson:

This opinion is issued in response to your request for an official opinion on the following three questions:

- 1) Does §290.140 grant a University of Missouri employee of 90 days or longer the right to receive after termination a service letter upon written request?
- 2) Is the University of Missouri a corporation doing business in Missouri as stated in §290.140?
- 3) Is the termination of employment of a non-tenured academic employee by a decision to not rehire this employee a discharge or voluntary termination under §290.140?

Section 290.140, RSMo 1978, states:

Whenever any employee of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee has quit such service; and if any such superintendent

Honorable Roger B. Wilson

or manager shall fail or refuse to issue such letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment.

Question number two provides a good starting place for this opinion, for it presents the issue of whether the above section applies to the University of Missouri. In order for the University to be subject to the requirements of this section, the University must come within the terms of the section, one of which requires that the employee be employed by ". . . any corporation doing business in this state. . ." The real issue then is whether the University can be said to be a corporation doing business in Missouri.

Section 172.020, RSMo 1978, states inter alia:

The university is hereby incorporated and created a body politic and shall be known by the name of 'The Curators of the University of Missouri', . . .

Chapter 172, RSMo 1978, State University, sets out the rights and duties of the board of curators of the University and describes the function of the University as a state supported provider of post-secondary education.

Since the word "incorporated" is mentioned in describing the entity, it must be decided whether the University can be characterized as a corporation doing business in this state. It appears that it cannot be so characterized. In the case of Hunt v. St. Louis Housing Authority, 573 S.W.2d 728 (Mo.App. St.L.D. 1978) the court addressed the issue of what the phrase ". . . corporation doing business in this state . . ." means. In Hunt, the court was faced with the question of whether a municipal corporation would be deemed to fall within the phrase in § 290.140, RSMo 1978. While the University is obviously not a municipal corporation, the court's reasoning in finding that § 290.140 does not apply to a municipal corporation appears equally applicable to the entity known as the University of Missouri.

In Hunt the court noted that the municipal corporation in question did not compete with private enterprise or operate for profit or as a source of revenue. These observations can also be made with regard to the University. In addition the court noted

Honorable Roger B. Wilson

that the word corporation as used in § 290.140 has been traditionally construed to mean a private business corporation. At page 730 the court states:

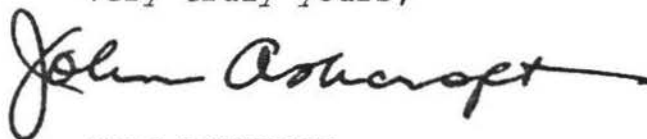
By legislative declaration and judicial definition, defendant constitutes a municipal corporation as that term is used in its broader sense to include public and quasi-corporations which act as arms of local government and exercise essential government functions . . . Our Constitution and statutes consistently recognize the difference between private business corporations and municipal corporations . . . [I]t has been judicially noted that a 'well settled distinction exists between the two' terms.

The University is a body politic exercising a government function, and the decision in Hunt appears to be equally applicable to the University. Therefore, the University not being a ". . . corporation doing business in this state . . .," the provisions of § 290.140, RSMo 1978, do not apply to the University.

Having determined that the section is inapplicable to the University, the necessity of answering questions number one and three of this request relating to the University's responsibilities under § 290.140, is eliminated.

It is the opinion of this office that the provisions of § 290.140, RSMo 1978, regarding an employer's responsibility relating to the issuance of a service letter do not apply to the University of Missouri.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

February 11, 1980

OPINION LETTER NO. 36

Honorable Harry Hill
Representative, District 2
R. R. #1
Novinger, Missouri 63559

Dear Representative Hill:

This letter is in response to your request for an official opinion on the question of whether idle funds of state universities may be deposited in savings and loan associations in Missouri. You further specify that your request relates to funds held by Northeast Missouri State University which were donated to the university by private citizens.

Section 369.194, RSMo 1978, appears to relate to the above question. That section provides inter alia:

Savings accounts in insured associations are legal and proper investments or depositories for fiduciaries of every kind and nature, all political subdivisions or instrumentalities of this state [emphasis added] . . . and each and all of them may invest funds in savings accounts in such associations.

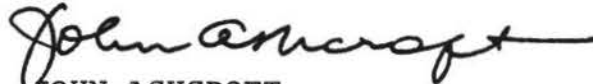
This section makes savings and loan associations "légal depositories" for "instrumentalities of this state." Therefore, if the university can be deemed an "instrumentality" of the state, the section is applicable.

In State ex rel. Thompson v. Board of Regents For Northeast Missouri State Teachers' College, 305 Mo. 57, 264 S.W. 698, 700 (banc 1924) the court specifically found that the Board of Regents of Northeast Missouri State Teachers' College was an instrumentality of the state. Thus, due to the university's status as an instrumentality of the state, § 369.194 makes savings accounts in insured savings and loan associations legal and proper investments or depositories for the university.

Honorable Harry Hill

We are enclosing for your reference Op. No. 62, Mallory, March 19, 1975, a portion of which deals with the question of the necessary security for investments in savings and loan associations.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enc. Op. No. 62

COUNTY CLERKS: The \$3.00 fee which the county clerk is authorized to receive for his services pursuant to § 51.410, RSMo Supp. 1979, does not apply where a different statute prescribes the fee which is to be charged and, in the absence of an express statutory provision, does not apply to services rendered by the clerk to the county, other political subdivisions or special districts of the state or to public officers of the state and local governments in the performance of their duties.

July 28, 1980

OPINION NO. 37

The Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County
Fulton, Missouri 65251



Dear Mr. Hamilton:

This opinion is in response to your question asking whether the \$3.00 fee which a county clerk is authorized to charge for his services pursuant to § 51.410, RSMo Supp. 1979, applies to various transactions which you have enumerated. We have written to the county clerk and asked him for clarification of some of the questions which are posed, and since we have not received such clarification, we will proceed to respond to those questions which are sufficiently clear to answer appropriately.

Section 51.410, RSMo Supp. 1979, provides:

The county clerk shall charge a fee of three dollars for each certificate, bond, filing, petition, license, order, recording, or other document, writing, or transaction handled in accordance with the duties of the office of county clerk. The clerk shall pay into the treasury of the county any and all fees collected under the provisions of this section.

You ask whether the county clerk is authorized to charge the \$3.00 fee for taking absentee ballots, and whether the clerk is authorized to charge such fee for certifying abstracts of votes to the secretary of state and to various political subdivisions. These questions are answered by Att'y Gen. Op. No. 182, Kirkpatrick, October 16, 1979, in which we concluded that the county clerk is not authorized to charge such fee for certain election procedures. A copy of that opinion is enclosed.

The Honorable C. E. Hamilton, Jr.

You ask whether the county clerk is authorized to charge such fee for filing campaign finance reports of committees and candidates under Chapter 130, RSMo. We enclose Opinion Letter No. 183, issued November 20, 1979, to James C. Kirkpatrick, which answers this question.

You ask whether the county clerk is authorized to charge such fee for filing pool table licenses. Under § 318.050, RSMo, the county clerk is paid fifty cents for each blank license not returned by the collector. We believe that this section applies and that the clerk should not charge the \$3.00 fee.

You ask whether the county clerk is to charge such fee in regard to exercising his duties concerning merchants' licenses. We assume you refer to the clerk's duties in issuing such licenses. Section 150.150, RSMo Supp. 1979, provides that the collector at the time of delivering such license will collect the sum of \$5.00, which is the fee allowed to the clerk for issuing the license. We believe that such section is applicable and that the legislature did not intend that the \$3.00 fee would be charged for issuing such license.

You have asked whether the county clerk should charge a \$3.00 fee for the issuance of an auctioneer's license. Section 343.090, RSMo, provides that the clerk will receive a \$2.00 fee for issuing such licenses which will be paid into the county general revenue fund. We believe that such section controls, and that the clerk should not charge the \$3.00 fee. We enclose Opinion No. 180, rendered November 9, 1979, to John W. Briscoe, relating to auctioneers' fees. The clerk must also charge the fees required by § 343.080, RSMo, for such licenses.

You have asked whether the county clerk should charge the \$3.00 fee for the filing of petitions for road openings and closings. We assume you refer to such provisions in Chapter 228, RSMo. It is our view that repealed § 51.410 specifically authorized a charge for the filing of such petitions and that present § 51.410 was intended to require a \$3.00 fee for the filing of such petitions.

You ask whether the county clerk is to charge such fee for the filing of licenses of physicians and surgeons pursuant to § 334.060, RSMo, which provides that a \$1.00 fee is to be charged for such filing. It is our view that the provisions of § 334.060 control, and that the \$1.00 fee is to be charged and not the \$3.00 fee.

You ask whether the county clerk is to charge such fee for his duties in regard to notaries public under §§ 486.230 and

The Honorable C. E. Hamilton, Jr.

486.235, RSMo. Under § 486.230, the secretary of state, as provided, prepares the notary commission and forwards it to the county clerk in the county of the applicant's residence. Under § 486.235, the applicant is required to submit an appropriate bond, take a prescribed oath and submit his signature specimen before the county clerk awards the applicant his commission as a notary public. We believe that a single \$3.00 fee should be charged by the county clerk for his services in connection with the awarding of such commissions.

You also ask whether the county clerk should charge an additional \$3.00 fee with respect to his duties in making filings with the secretary of state's office in regard to other matters relating to such notaries public. We assume you refer to § 486.245, RSMo, under which the county clerk is required to forward to the secretary of state the notary public's bond, signature and oath. It is our view that the \$3.00 fee should not be charged for such certification.

You state that the county clerk under § 51.122, RSMo, is to aid individuals with gas tax forms and ask whether such \$3.00 fee should be charged for such assistance. Section 51.122 requires that the county clerk in counties of the second, third and fourth classes shall assist in the preparation of gas tax refund forms when requested by residents of the county. In our view such section indicates a legislative intent that no fee would be charged for such services. Therefore, we do not believe that any such fee should be charged.

You ask whether school boards which are required to file school levy forms with the county clerk's office should be charged a \$3.00 fee for such filings. We assume you refer to the estimates under § 164.011, RSMo, on which the clerk extends the taxes. Since the filing is made by another political subdivision, pursuant to its legal responsibilities, we do not believe that the legislature intended that such a fee would be charged.

You ask whether such fee should be charged for the filing of bonds of county officials. We do not believe that it was the legislative intent to require that the \$3.00 fee be charged for the filing of officers' bonds with the county clerk.

The Honorable C. E. Hamilton, Jr.

We believe that the conclusions that we reach here may be summarized under three separate theories. The first is that when the county clerk performs a service for which a statute other than § 51.410 specifies a particular fee, the fee so prescribed is applicable and not the \$3.00 fee. Secondly, it is our view that in the absence of an express statutory provision where a political subdivision or special district of the state or a public officer of the state is required to make a filing or to request a certification or the like from the county clerk pursuant to its or his official duties, such a fee should not be charged. Thirdly, it is our view that individuals who require services of the clerk as enumerated in § 51.410 should be charged the \$3.00 fee for such services in the absence of a contrary statutory provision.

It is our understanding that § 51.410 was amended with a view to simplifying the charges for the clerks' services. Obviously, the prior section was out of date and for that reason it is not possible to lay down a general rule to the effect that the \$3.00 fee should be charged for all of the enumerated services under prior § 51.410.

Finally, it seems clear that § 51.410 has generated considerable confusion and as a consequence is a good subject for legislative revision.

CONCLUSION

It is the opinion of this office that the \$3.00 fee which the county clerk is authorized to receive for his services pursuant to §51.410, RSMo Supp. 1979, does not apply where a different statute prescribes the fee which is to be charged and, in the absence of an express statutory provision, does not apply to services rendered by the clerk to the county, other political subdivisions or special districts of the state, or to public officers of the state and local governments in the performance of their duties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures

Att'y Gen. Op. 182-1979
Att'y Gen. Op. Ltr. 183-1979
Att'y Gen. Op. 180-1979

August 7, 1980

OPINION LETTER NO. 38
(Answer by Letter-Sprague)

Honorable Russell G. Brockfeld
Representative, District 108
Room 204, State Capitol
Jefferson City, Missouri 65101



Dear Representative Brockfeld:

You have requested our legal opinion on the following question:

Can those households which would otherwise qualify for utilicare participation but in which the heating bill is in some other name actually participate and receive utilicare benefits?

Your question has reference to Senate Committee Substitute for House Committee Substitute for House Bills Nos. 545, 21 and 485, enacted by the First Regular Session of the 80th General Assembly, which mandated the establishment of a "utilicare" program by the Department of Social Services.

According to Section 2 of the bill:

The department shall issue a 'utilicare card' to every household which makes application in which the head of the household or spouse has attained the age of sixty-five and the income for the prior calendar year does not exceed \$7,500.

Section 3 of the bill describes procedures for application for a utilicare card, and Section 4 describes how the holder of a utilicare card may sign up with the supplier of the primary heating source for the household requesting that the supplier bill the state's utilicare program for 50 percent of the household's heating bills for the months of December, January and February, but not to exceed \$50 per month.

Honorable Russell G. Brockfeld

In your letter, you describe your particular concern as follows:

The Division of Family Services estimates that in some areas of the state as many as 20% of the households in which the occupants are 65 or older will have the heating bill in some name other than that of the occupants. Usually this will be a member of the family of the occupants, most likely a child.

The bill does not define "head of the household," but in Missouri case law the word "household" is synonymous with "family." Giokaris v. Kincaid, 331 S.W.2d 633, 641 (Mo. 1960).

In Cobb v. State Security Ins. Co., 576 S.W.2d 726 (Mo. banc 1979), the court said at 738:

In Mission Insurance Company v. Ward, 487 S.W.2d 449, 451 (Mo. banc 1972) 'household' is defined as 'those who dwell under the same roof and compose a family.' 'Family' is defined as "the body of persons who live in one house and under one head including parents, children, servants, and lodgers" [Citation omitted.]

'Household' is a chameleon like word. The definition depends on the facts of each case. It is difficult to deduce any general principles.

The head of the household may have a legal or moral obligation to support one or more of the other members of the household or immediate family, such as under Missouri's homestead laws. State v. Haney, 277 S.W.2d 632, 636 (Mo. 1955). However, this obligation would not preclude the head of the household from receiving assistance, either partially or totally, from sources outside the household or immediate family in obtaining and paying for essential utility services for the household.

Such assistance could come from a number of sources, including members of the family living outside the household, or a governmental program such as the "utilicare" program of the Missouri Department of Social Services.

Honorable Russell G. Brockfeld

The bill finally enacted by the General Assembly provides for a program of financial assistance to elderly households for the payment of charges for the primary heating source for the household.

The only requirements for eligibility of a household to receive a "utilicare card," and thus be eligible for participation in the utilicare program, are:

1. The head of the household or spouse has attained the age of 65, and
2. The income of the household for the prior calendar year does not exceed \$7,500.

The bill provides that every household which makes application for a utilicare card, in which the above two requirements of eligibility are met, shall be issued a utilicare card.

It is noteworthy that the General Assembly did not impose any exception in the law that would exempt from participation in the utilicare program any household in which the primary heating utility service was listed or contracted for in the name of someone not a member of the household. Specifically, sections 3 and 4 of the bill require only the participation of the household and the supplier of the primary heating utility service in procedures for application for a utilicare card and in procedures for requesting payment by the state's utilicare program.

Section 3 provides for issuance of a utilicare card to any applicant of a household who submits proof of age and income qualifications. It does not require that the primary heating utility service be in the name of the applicant for the utilicare card, nor does it require that anyone other than a member of the eligible household in whose name the utility service might be listed must join in the application.

Section 4 provides for procedures whereby a cardholder can request the supplier to bill the state's utilicare program for 50 percent of the householder's primary heating bills for December, January and February (but not more than \$50 per month). Forms requesting state payment of the bills must be signed only by the cardholder and by the supplier. Again, there is no requirement that anyone other than a member of the eligible household be involved in signing up for participation in the utilicare program.

Honorable Russell G. Brockfeld

It is our view that the intent of the General Assembly was not to exclude any elderly household from participation in the utilicare program where the above age and income qualifications were met. It is also our view that only by establishing objective and easily ascertained qualifying standards can such a program be workable. Under the draftsmanship of the present bill there can be little if any doubt as to the eligibility of a qualifying household to participate in the program.

To impose a requirement that the utility service must be billed in the name of a member of the household and not in the name of someone outside the household could pose problems perhaps not envisioned by those who seek universal application of provisions of the bill to low income elderly families.

There are several reasons utility services could be billed to someone other than a member of the household receiving the utility service. One is that the household lacks the financial resources to pay the bill. Another could be that although the household has resources to pay the bill, its members lack capacity due to problems of age or illness to handle their own affairs and obligations. In the latter instance for example, it could be more convenient for another person outside the family to handle such affairs and imposition of a requirement that a member of the household must be billed for such services could deprive that household from participation in the program.

In conclusion, it is our view that it is immaterial to the purpose of the utilicare bill whether the service is in the name of someone outside the household. That portion of the bill not paid by the state under "utilicare" would still be due and owing to the utility by the person in whose name the service was listed or contracted for, whether that person be a household member or someone outside the household. The obvious intent of the bill was that all households in which the head of the household or spouse has attained the age of 65 and whose income for the prior calendar year does not exceed \$7,500 should be eligible to participate in the utilicare program. The obvious intent of the General Assembly in enacting this bill was to remove the burden of payment of utility bills from elderly persons with low income who could not afford to pay them themselves and who might be forced to seek assistance from other members of their family living outside the household who could thus be doubly burdened with payment of utility bills.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

Modified by CP. 40-1982

MENTAL HEALTH:

A mental health board of trustees established pursuant to §§ 205.975, RSMo, et seq., cannot hold title to real property or issue tax anticipation notes. However, the county courts, as governing bodies of a third class county, can hold title to real property. Such county court can issue tax anticipation notes for mental health boards based upon the anticipated revenues to be derived from a tax levy under § 205.980, RSMo.

July 11, 1980

CORRECTED COPY
OPINION NO. 41

Honorable Steve F. Lampo
State Representative
139th District
Post Office Box 151
Neosho, Missouri 64850



Dear Mr. Lampo:

This opinion is rendered in response to your inquiry concerning the authority of mental health boards or "governing bod[ies]" to hold title to real property and issue tax anticipation notes wherein you ask:

Do Sections 205.975, RSMo et seq., authorize a mental health board of trustees established pursuant the same to:

- (1) Hold title in real property, and
- (2) Issue tax anticipation notes or, to allow the 'governing body' as defined by 205.975 to do either (1) or (2) or both of the above described.

I. Authority of a mental health board of trustees to hold title to real property.

Section 205.975(1), RSMo, defines the purposes of a board of trustees as follows:

. . . administering a county community mental health fund to establish and operate a community mental health center, mental health clinics, or any comprehensive mental health services; to supplement existing funds for a center, clinics, or services, or to purchase services from a center, clinics, or public facilities and not for profit corporations providing any comprehensive mental health services; (Emphasis added.)

Honorable Steve F. Lampo

The powers and duties of the board of trustees are set out in § 205.986, RSMo. Section 205.986, RSMo, states, in part, that a board of trustees shall have the ". . . powers and responsibilities to ; administratively control and manage the community mental health fund . . ." for the purposes set forth in § 205.977, RSMo, and § 205.982, RSMo (emphasis supplied). Section 205.986, RSMo, goes on to describe a board of trustees as having administrative control and management of community mental health centers, mental health clinics or comprehensive mental health services; administering and disbursing the community mental health fund for the provision of any comprehensive mental health services; having the authority to contract with existing public facilities or not for profit corporations for the provision of services; and submitting required information on the disbursement of moneys from the community mental health fund. No mention is made of a power to acquire or hold title to real property. Rather, as will be discussed further, this authority is reserved to the counties.

Inasmuch as the boards of trustees are creatures of statute, they:

. . . 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable' Lancaster v. County of Atchison, 352 Mo. 1039, 180 S.W.2d 706, 708 (banc 1944).

Furthermore, the individual members of the mental health board of trustees are public officers as defined by State ex rel. Zevely v. Hackman, 300 Mo. 59, 254 S.W. 53 (banc 1923). Public officers have only such power and authority as are clearly conferred by law or necessarily implied from the powers granted. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191 (1931); 67 C.J.S. Officers, § 190.

For the reasons set forth, in the absence of a clear authorization to a board of trustees to hold title to real estate, a mental health board of trustees cannot hold title to real estate.

II. Authority of mental health boards of trustees to issue tax anticipation notes.

We find no constitutional or statutory power or authority given to a mental health board of trustees to issue tax anticipation notes and it is therefore our view that no such power or authority exists.

Honorable Steve F. Lampo

III. Authority of "governing body" to hold title to real property.

Section 205.975, RSMo, defines a governing body as a "county court, county legislature, or other chief legislative body of a county or city not within a county."

Section 49.270, RSMo, provides that a county court:

. . . shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; . . .

Section 205.982, RSMo, provides that governing bodies may contract with each other to establish community mental health centers, mental health clinics, or comprehensive mental health services. Section 205.986(1), RSMo, refers to community mental health centers, mental health clinics, or comprehensive mental health services established by a county or combination of counties.

The general authority of courts to acquire and hold real property coupled with the specific references in Chapter 205, RSMo, to the establishment of community mental health centers, mental health clinics, or comprehensive mental health services by counties lead to the conclusion that county courts, as governing bodies of counties, may hold title to real property.

IV. Authority of "governing body" to issue tax anticipation notes.

We note that your request for an opinion arises, in part, from the desire of the board of trustees of the Mental Health Board of Newton and McDonald Counties to purchase real property and issue tax anticipation notes. Therefore, as both Newton and McDonald Counties are third class counties, this portion of the discussion and opinion will be limited to counties of the third class.

Generally speaking, tax anticipation notes are negotiable notes payable out of current revenues to be derived from taxes or other revenues. Tax anticipation notes must be payable out of the county income and revenues for the year. Sections 50.070, RSMo, et seq.

Honorable Steve F. Lampo

As noted, the definition of governing body in § 205.975, RSMo, includes county courts. As tax anticipation notes are authorized to be issued by county courts of counties of the third class by § 50.070, RSMo, the county courts, as governing bodies of third class counties, may issue tax anticipation notes. We enclose opinions No. 230, Reid, 11/25/75; No. 318, Burrell, 9/9/65; and No. 20, Crouch, 3/16/61, holding that county courts may issue tax anticipation notes for county hospitals, county health centers and county mental health clinics. We believe the reasoning in the enclosed opinions is applicable to issuance of tax anticipation notes by the county courts for mental health boards. You will note that the tax anticipation notes for mental health boards are limited to anticipated revenue from the tax levy authorized by § 205.980, RSMo, under the reasoning of the enclosed opinions.

CONCLUSION

It is the opinion of this office that a mental health board of trustees established pursuant to §§ 205.975, RSMo, et seq., cannot hold title to real property or issue tax anticipation notes. However, the county courts, as governing bodies of a third class county, can hold title to real property. Such county court can issue tax anticipation notes for mental health boards based upon the anticipated revenues to be derived from a tax levy under § 205.980, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hannelore D. Fisher.

Very truly yours,



JOHN ASHCROFT
Attorney General

Encs: Op. No. 20, Crouch,
3/16/61
Op. No. 318, Burrell,
9/9/65
Op. Letter No. 230, Reid,
11/25/75

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

March 26, 1980

OPINION LETTER NO. 42
(Answer by Letter-Marshall)

Mr. Stephen R. Sharp
Prosecuting Attorney
Dunklin County Courthouse
Kennett, Missouri 63857



Dear Mr. Sharp:

This letter is in response to your request for an official Attorney General opinion. I understand your question to be as follows:

Will Dunklin County become a second class county on January 1, 1981?

As you point out, Section 48.020, RSMo 1969, requires that a county obtain an assessed valuation of \$70-million and maintain that assessed valuation for a period of five years before it may become a county of the second class. However, Section 48.020, RSMo 1979 (80th General Assembly, House Bill No. 583), which became effective September 28, 1979, requires that a county attain an assessed valuation of \$125-million and maintain that assessed valuation for a period of five years before becoming a county of the second class.

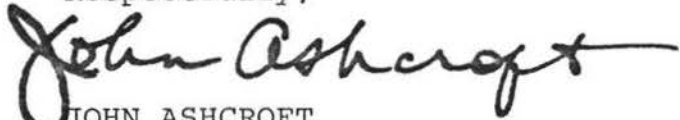
It is our understanding that Dunklin County achieved an assessed valuation greater than \$70-million in the fiscal year 1975 and has maintained that assessed valuation since that time. Thus, Dunklin County would have achieved its required five years or assessed valuation of \$70-million during the calendar year 1979. However, it was during that calendar year that the law was changed to require that an

Mr. Stephen R. Sharp

assessed valuation must reach \$125-million before a county may move to a county of the second class. Accordingly, the question now becomes does Dunklin County become a county of the second class January 1, 1981, Section 48.020, RSMo 1979 (80th General Assembly, House Bill No. 583) to the contrary notwithstanding or is Section 48.020, RSMo 1979 (80th General Assembly, House Bill No. 583) applicable to Dunklin County upon its effective date thereby barring Dunklin County from becoming a county of the second class because it has not attained the newly prescribed assessed valuation of \$125-million and maintained said assessed valuation for a period of five years.

As you know the Supreme Court of Missouri in Chaffin v. County of Christian, 359 S.W.2d 730 (Mo. banc 1962) and Russell v. Callaway County, 575 S.W.2d 193 (Mo. banc 1978) cited Art. VI, §8 of the Missouri Constitution in declaring that only four classifications of counties are permitted by said constitution. Accordingly, in both Chaffin, supra and Russell, supra, the Missouri Supreme Court set aside statutes which created constitutionally impermissible fifth classes of counties. It is the opinion of this office that a similar question is raised as a result of the enactment of Section 48.020, RSMo 1978 (80th General Assembly, House Bill No. 583). Since the Missouri Supreme Court has determined that this office is not empowered to rule upon the constitutionality of Missouri statutes, it is our position that the question you raise may only be determined by a competent court of law of the State of Missouri. Accordingly, if you desire a definitive answer to your question, it is our recommendation that you take appropriate steps to institute litigation as to the status of Dunklin County.

Respectfully,

A handwritten signature in black ink that reads "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

February 13, 1980

OPINION LETTER NO. 43

Honorable Dennis K. Hoffert
Chairman, State Tax Commission
623 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Hoffert:

This letter is in response to your question asking:

Does the State Tax Commission of Missouri possess the statutory authority to convene assessors' training schools to be conducted by a professional assessment organization, to pay the assessors' tuition for the schools, and to pay a per diem to attending officials, as set forth in the budget request of the Commission and as included in an appropriation bill enacted by the General Assembly?

You also state:

In the last session of the General Assembly an appropriation bill was enacted funding the State Tax Commission for FY 1980. The State Tax Commission had included \$70,750 in its budget request for a priority item entitled 'Assessor Education.' This amount was granted to the Commission

Honorable Dennis K. Hoffert

in its operations allotment. Included in the \$70,750 was \$31,250, appropriated for the purpose of providing a \$25.00 per diem reimbursement to assessing officials who attend assessor training schools and \$27,500 to cover the cost to the Commission of providing for a professional assessment organization to conduct the schools.

The Office of Administration has expressed the opinion that there is insufficient statutory authority for the Commission to authorize the payment of the per diem to attending officials.

We also understand that it is anticipated that the courses of instruction will be given at approximately four locations in Missouri. The \$25.00 per diem expense allowance is intended to cover the personal expenses of the assessors in attending such a meeting and mileage expenses will not be paid to such assessors in attending such meeting.

However, in order to accomplish these objectives, it is necessary that the State Tax Commission have the requisite statutory authority. Unquestionably, the Commission has general statutory authority over assessing officials pursuant to § 138.410, RSMo 1978, but this section cannot be used to expand the Commission's power into an area specifically covered by other sections of law. The appropriation of money by the general assembly does not constitute authority for the Commission to act because legislation of a general character cannot be included in an appropriations bill. See State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934), and State ex rel. Gaines v. Canada, 113, S.W.2d 783, 790 (Mo. En banc 1937).

Section 138.450, RSMo 1978, authorizes the Commission to call an annual group meeting of two or more assessors and to reimburse them for actual transportation expenses at the same rate as that established by the Commissioner of Administration under the provisions of § 33.090, RSMo. Per diem for such meetings is set at \$9.00. More importantly, § 53.091, RSMo 1978, specifically deals with the assessment studies required of assessors. Section 53.091 reads as follows:

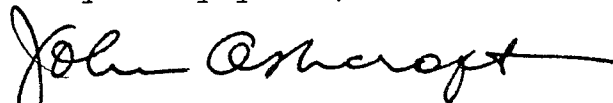
The assessors of this state, in addition to their other duties, shall attend a course of studies as prescribed by the state tax commission as is here-

Honorable Dennis K. Hoffert

in provided. Such studies shall be designed to develop standarized means and methods of assessment of and a professional competence regarding assessments of real property and tangible personal property. The state tax commission shall establish such a course containing a curriculum containing the practices and procedures of assessors. Instructors shall be persons of professional competence from the staff of the state tax commission and such county assessors as the commission may deem to have adequate qualifications and professional experience. Each assessor shall as early in his term as is reasonably convenient attend such course at location and time set by the commission, and upon completion thereof be given a certificate. From time to time, assessors may be required by the commission to attend further instruction where the need exists and facilities are available and where the commission believes such studies are necessary to have assessors current on developments in practices and procedures of assessing real and tangible personal property, and the expenses for attending such course of study shall be reimbursed in the same manner as is provided in section 138.450, RSMo.

This section deals exhaustively with the Commission's authority to hold training sessions for assessors. It not only outlines the purposes to be accomplished by such training sessions and the instructors to be utilized, said section limits the allowable expenses to those set forth in § 138.450. Therefore, it is our opinion that the appropriations mentioned in your opinion request cannot be utilized in the manner suggested.

Very truly yours,



JOHN ASHCROFT
Attorney General

May 9, 1980

OPINION LETTER NO. 44
(Answer by Letter-Schroeder)

The Honorable Phil Barry
Representative, District 105
5050 Lampglow
St. Louis, Missouri 63129



Dear Mr. Barry:

This letter is in response to your following inquiries:

(1) In Title XXI, Chapter 314, Section 314, Section 314.010(2) the word 'unrelated' is used. What is the significance of this term in relation to the definition of the term 'handicap'?

(2) With regard to §§ 314.010 to 314.080 inclusive of Chapter 314, are public accommodations required to alter their premises in such a way as to allow handicapped persons to use the premises without being in violation of municipal health and safety codes?

Section 314.010, RSMo, provides:

1. All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, creed, color, religion, national origin, sex, ancestry, or handicap.

2. 'Handicap' means a physical or mental impairment resulting in a disability unrelated to a person's ability to utilize the existing public accommodation.

The Honorable Phil Barry

In our view the statute is clear. It means simply that a person who is handicapped in the usual sense of the term cannot be discriminated against because of his handicap. However, since the statutory definition of "handicap" excludes as a handicap a disability which is related to the person's ability to utilize the existing public accommodation, the statute does not mean that the place of public accommodation, as defined in § 314.020, RSMo, must be modified to accommodate the handicap.

It is clear also that the legislature has provided construction standards to accommodate certain handicapped persons in §§ 8.610, RSMo, et seq., for public buildings, with some exceptions not relevant here, and facilities for public use and assembly, which are constructed in whole or in part by the use of state funds, or the funds of any political subdivision of this state.

It follows in our view that if the legislature intended to provide standards similar to those contained in § 8.610, et seq., for places coming within the definition of § 314.020, it could have done so quite easily. Having not done so, and in light of the clear language of § 314.010, we must conclude that the discrimination prohibited under § 314.010, et seq., relates only to discrimination because of a handicap which is not related to the person's ability to utilize the existing public accommodation and therefore does not require that the premises be altered to meet the needs of handicapped persons.

Very truly yours,

JOHN ASHCROFT
Attorney General

July 9, 1980

OPINION LETTER NO. 45
(Answer by Letter-Klaffenbach)

The Honorable Don Randall
Representative, District 8
4011 Pickett Road
St. Joseph, Missouri 64503

FILED

45

Dear Mr. Randall:

This letter is in response to your question asking:

Can the executive director of the Missouri State Employees' Retirement System, an actuary, perform the required actuarial studies as required by House Bill 130 of 1979?

You also state:

House Bill 130 of the 1st Regular Session of the 80th General Assembly (1979), now sections 105.660 to 105.685, requires that certain actuarial information be developed for any bill which proposes a substantial change in retirement benefits for any member of a retirement plan.

It is unclear as to who is to pay for such studies.

The executive director of the Missouri State Employees' Retirement System is an actuary within the definition of same contained in H.B. 130. Can he perform the actuarial studies required?

The Honorable Don Randall

Can he be reimbursed for this additional duty? Must he or the system be reimbursed? Is there a potential conflict of interest?

House Bill No. 130, 80th General Assembly (now Sections 105.660, RSMo Supp. 1979, et seq.) requires an actuarial study with respect to certain legislative changes in retirement plan benefits for elected or appointed public officials or employees of the state of Missouri or any political subdivision or instrumentality of the state.

You have stated that the executive director of the Missouri State Employees' Retirement System is an actuary within the definition of § 1(5), which provides that an actuary is either one who is a member of the American Academy of Actuaries or who is an enrolled actuary under the Employee Retirement Income Security Act of 1974 and who is experienced in retirement plan financing.

Section 3 of House Bill No. 130 provides that when the general assembly is the legislative body responsible for authorizing a substantial proposed change in plan benefits, a prepared statement regarding the cost of such change shall be made available for its consideration prior to taking final action and if any additional change in cost or benefits is made by either house or committee thereof, the actuary making the original cost statement is required to amend the statement to reflect the additional feature. Also under § 3 the statement of costs is required to be filed in the office of the chief clerk of the Missouri House of Representatives and with the secretary of the Senate.

Section 5 of House Bill No. 130 provides:

1. For any proposed change in plan benefits, the expense of having the cost statement prepared shall be assured before the legislative body may take final action to approve a proposed substantial change in plan benefits.

2. The expense of having the cost statement prepared shall be paid by the plan if the substantial proposed change is initiated or approved by the plan's governing board.

The Honorable Don Randall

3. When the general assembly is the legislative body considering a proposed change in plan benefits, the committee on state fiscal affairs, upon approval by a majority of the statutory number of representatives serving on the committee, may assume the expense of preparing a cost statement required by this act by employing or contracting with an actuary or actuaries who possess the qualifications required by the provisions of this act upon such terms as may be agreed upon and within the limits of appropriations made therefor, or may order the plan to provide such statement.

4. If the expense of preparing the cost statement is not assured by reason of subsections 2 or 3 above, the expense shall be paid by the individual, group or individuals, department or agency seeking such proposed change.

Under § 104.460, RSMo, the board of trustees of the retirement system has authority to appoint a secretary, assistant secretary and other employees of the system. The salary for the executive director (secretary) of the retirement system is not set by law, and he does not serve for a particular term. Such employees of the system receive such salaries as are fixed by the board and their necessary travel expense as authorized by the board under § 104.470, RSMo.

Although § 2 of House Bill No. 130 provides that the legislative body or committee, which determines the amount and type of plan benefits to be paid shall, before taking final action on any substantial proposed change in plan benefits, cause to be prepared a statement regarding the cost of such change as provided therein, we believe that the provisions of § 5.3 are applicable where the General Assembly is the legislative body considering a proposed change in plan benefits. Under § 5.3, the committee on state fiscal affairs, upon proper approval, may assume the expense of preparing a cost statement by employing or contracting with an actuary or actuaries who possess the required qualifications upon such terms as may be agreed upon and within the limits of appropriations made therefor or may order the plan to provide such statement. And, if the expense is not assured by reason of § 5.2, § 5.3, the expense is to be paid pursuant to § 5.4.

The Honorable Don Randall

In our view, the actuarial study is a mathematical process and it would not be improper for the executive director (secretary) of the retirement system as a defined actuary with the consent of the board of trustees to perform the study which is required and, if authorized, to receive compensation for the study irrespective of the source of the compensation.

Very truly yours,

JOHN ASHCROFT
Attorney General

MERIT SYSTEM:

PERSONNEL BOARD (DIVISION):

1. Regulations of the Personnel Advisory Board promulgated under § 36.350, RSMo Supp. 1979, apply to all state agencies, merit and non-merit, except the University of Missouri. 2. Dismissal procedures under § 36.390.5, RSMo Supp. 1979, apply to non-merit agencies under § 36.390.7, RSMo Supp. 1979, unless they adopt similar procedures under § 36.390.8, RSMo Supp. 1979, except that such procedures need not apply to employees in policymaking positions, members of the military or law enforcement agencies or employees of academic institutions under § 36.390.8. 3. Agencies subject to § 36.390.7 and not excepted therefrom are not prohibited from changing from one procedure to another in the processing of dismissals. Any procedure so established by a non-merit agency does not need to be formulated as a rule under Chapter 536, RSMo 1978, unless otherwise required by a statute which is peculiar to that agency. 4. Section 36.510, RSMo Supp. 1979, is applicable to all state agencies except the University of Missouri. 5. Sections 36.350, 36.390, and 36.510 are not applicable to the legislative or judicial branches or to elective officials of the executive branch or to agencies having a bi-state character.

November 6, 1980

OPINION NO. 46

Mr. Stephen C. Bradford
Commissioner of Administration
Room 125, State Capitol Building
Jefferson City, MO 65101



Dear Mr. Bradford:

This replies to your opinion request concerning the following questions:

The question which the Personnel Division and the Personnel Advisory Board wish to have resolved is the identity of the specific agencies of state government in which the Director and the Board have been given additional responsibilities and authority as the result of changes in Chapter 36 RSMo under CCS for HB673 which became effective September 28, 1979. This question involves three sections of the new "State Personnel Law" as follows:

a. Apart from merit agencies previously covered by Chapter 36 RSMo, to which state agencies is Section 36.350 of CCS for HB673 now

Mr. Stephen C. Bradford

applicable? Are there any other provisions of law which preclude the application of the regulations of the Personnel Advisory Board under Section 36.350 to certain state agencies?

b. What procedure is required for "non-merit agencies of the state" to adopt the appeal provisions of the Personnel Advisory Board for dismissals under Section 36.390.7 of CCS for HB673? Once adopted by formal action of the appointing authority, are these procedures binding on such agency for the future or may this adoption be withdrawn at any time?

c. Apart from the merit agencies previously covered by Chapter 36, RSMo, in which state agencies does Section 36.510 require the Director to perform the functions outlined therein? Are there other provisions of law which preclude the director from performing one or more of the following functions enumerated in Section 36.510 in any agency of state government?

- (1) Develop, initiate and implement a central training program
- (2) Establish a management trainee program and prescribe rules for a career executive service for the state
- (3) Formulate for approval of the Board regulations for mandatory training
- (4) Institute, coordinate and direct a state-wide program for recruitment of personnel
- (5) Assist all state departments in setting productivity goals and in implementing a standard system of performance appraisals
- (6) Establish and direct a central labor relations function including approval of any agreements relating to uniform wages, benefits and aspects of employment with fiscal impact
- (7) Formulate rules for approval of the board and establish procedures and standards to secure essential uniformity and

Mr. Stephen C. Bradford

comparability among state agencies (Emphasis in original)

The concern of the Director of the Division of Personnel and Chairman of the Personnel Advisory Board is more succinctly stated in the opinion request, paragraph No. 4, concerning the facts giving rise to the question. Those facts are:

CCS for HB673 has changed Chapter 36 RSMo from the State Merit System Law to the State Personnel Law. While not placing all agencies under the merit system for personnel selection, etc., the new law does provide for the Director to perform certain personnel functions in "all agencies of state government" and it applies certain regulations of the Personnel Advisory Board to all such agencies, not just to merit system agencies as in the past. Those agencies which are subject to these regulations and in which the director has authority and responsibility for functions enumerated in Section 36.510 must be identified at this time. The Director must under Section 36.510.1(7) initiate a study in the next few months and determine the resources needed for program implementation. The law requires him to submit to the Governor and the General Assembly a description of the proposed scope of programs and a request for funding. The study to determine program scope cannot be made until each specific agency subject to the new provisions is identified. If the authority of the Director and the Board is limited in certain agencies and/or programs because of the legal powers of such agencies, this should be clarified.

The sections concerned in your questions are: § 36.350, portions of § 36.390, and § 36.510, all of which are now found in RSMo Supp. 1979.

Section 36.350, RSMo Supp. 1979, provides:

The regulations shall provide for the hours of work, holidays, attendance, and leaves of absence in the various classes of positions subject to this law. They shall contain provisions for annual leave, sick leave, and special leaves of absence, with or without pay, or with reduced pay, and

Mr. Stephen C. Bradford

may allow special extended leaves for employees disabled through injury or illness arising out of their employment, and the accumulation of annual leave and sick leave. Such regulations shall apply in all state agencies. (Emphasis added)

Subsections 7 and 8 of § 36.390, RSMo Supp. 1979, provide:

7. The provisions for appeals provided in subsection 5 for dismissals of regular merit employees may be adopted by non-merit agencies of the state for any or all employees of such agencies.

8. Agencies not adopting the provisions for appeals provided in subsection 5 shall adopt dismissal procedures substantially similar to those provided for merit employees. However, these procedures need not apply to employees in policymaking positions, or to members of military or law enforcement agencies, or to employees of academic institutions.

Section 36.510, RSMo Supp. 1979, provides:

1. In addition to other duties specified elsewhere in this chapter, it will be the duty of the director to perform the following functions in all agencies of state government:

(1) Develop, initiate and implement a central training program for personnel in agencies of state government and encourage and assist in the development of such specialized training activities as can best be administered internally by these individual agencies;

(2) Establish a management trainee program and prescribe rules for the establishment of a career executive service for the state;

(3) Formulate for approval of the board regulations regarding mandatory training for persons employed in management positions in state agencies;

Mr. Stephen C. Bradford

(4) Institute, coordinate and direct a statewide program for recruitment of personnel in cooperation with appointing authorities in state agencies;

(5) Assist all state departments in setting productivity goals and in implementing a standard system of performance appraisals;

(6) Establish and direct a central labor relations function for the state which shall coordinate labor relations activities in individual state agencies, including participation in negotiations and approval of agreements relating to uniform wages, benefits and those aspects of employment which have fiscal impact on the state; and

(7) Formulate rules for approval of the board and establish procedures and standards relating to position classification and compensation of employees which are designed to secure essential uniformity and comparability among state agencies. This section shall become effective on July 1, 1980, and the director shall prior to that time initiate the required study and investigate to determine the resources needed for its implementation. The director shall submit a description of the proposed scope of programs to be implemented and a request for necessary funding to the governor and the general assembly.

2. Any person who is employed in a position subject to merit system regulations and who engaged in a strike or labor stoppage shall be subject to the penalties provided by law.

Not all state agencies are within the state merit system law. Agencies which are not now merit system agencies are the Department of Revenue, Department of Highways and Transportation, Department of Conservation, Department of Elementary and Secondary Education, Department of Higher Education, Department of Agriculture, portions of the Department of Consumer Affairs, Regulation, and Licensing, portions of the Department of Labor and Industrial Relations,

Mr. Stephen C. Bradford

and portions of the Department of Public Safety. Some of these latter departments do have divisions which are a part of the merit system. Section 36.030, RSMo Supp. 1979, sets out those agencies which are covered more specifically.

In the 1979 revision of the state merit system law, Chapter 36, it should be first noted that § 36.010, RSMo Supp. 1979, provided that Chapter 36 would now be known as the "State Personnel Law." Obviously, the legislature intended to broaden the overall scope of the law to include non-merit agencies in some respects. Your inquiry is related to the non-merit agencies which might be covered by certain recent statutory changes.

Art. IV, § 19, Mo. Constitution (1945), recites:

The head of each department may select and remove all appointees in the department except as otherwise provided in this constitution, or by law. All employees in the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit, ascertained as nearly as practicable by competitive examinations; provided that any honorably discharged member of the armed services of the United States who is a citizen of this state shall have preference in examination and appointment as prescribed by law.

We will not lengthen this opinion with a full discussion of all the statutes enacted prior to the provisions in question because it is our view that the provisions of the state personnel laws, which we have quoted above, will govern over any prior conflicting statutes. The principal question in our view is whether or not these provisions of the state personnel laws conflict with the constitutional authority of any such agencies.

There are some general principles of law which we must address. An act of the Missouri legislature is presumed to be valid and will not be declared unconstitutional unless it is clearly shown that the provisions are unconstitutional. State ex inf. Danforth ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. Banc 1975). From this doctrine flows the concept that courts do not favor interpretations declaring statutes unconstitutional if there is any reasonable way in which to construe a statute in order to sustain it.

Mr. Stephen C. Bradford

Art. IV, § 19 indicates that except where a statute so provides, or as provided in the Constitution of this state, the head of the department may select and remove employees in that department. However, employees in state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit.

Clearly, in amending Chapter 36 in 1979, the Missouri legislature approved changing Chapter 36 from the state merit system law to the state personnel law. In recognizing certain other constitutional provisions, the legislature attempted to fit in uniform application of personnel policies and procedures to all state agencies. This will become more evident as discussed herein.

Dealing specifically with Part a. of your first question relating to § 36.350, we have reviewed the constitutional and statutory provisions relating to all state agencies including the University of Missouri. With the exception of the University of Missouri, we believe that § 36.350 is viable and applicable to all other non-merit state agencies.

We note that Art. IV, §§ 29 through 34, Mo. Constitution (1945), relating to the Department of Highways and Transportation makes no mention of personnel policies, practices, or powers. There is no reason why the Department of Highways and Transportation should not be included under a state personnel plan such as this.

The Department of Conservation comes under Art. IV, § 42, Mo. Constitution (1945) which provides that the commission shall fix the qualifications and salaries of the director and all other appointees and employees. There again is nothing in such provisions to prevent § 36.350 from applying to the Department of Conservation.

With regard to the Department of Elementary and Secondary Education, Art. IX, § 2(b), Mo. Constitution (1945), provides that the board of education, upon recommendation of the commissioner of education, shall appoint professional staff and fix their compensation. This provision does not, in our view, prevent § 36.350 from applying to the Department of Elementary and Secondary Education.

With regard to state colleges, there are no specific constitutional provisions relating to any type of professional policies and powers. While Chapter 174, RSMo 1978, provides that the management of each college shall be vested in a board of regents which may appoint and dismiss employees and fix the terms and conditions of employment, we believe the subsequent enactment of § 36.350 to apply to all state agencies was intended to impact on state colleges. While we understand further that repeal by implication is not favored in the law, it is clear to us that the board of regents of the state colleges fall within the terms of § 36.350.

Mr. Stephen C. Bradford

With regard to the University of Missouri, we believe that there can be no question but that under Art. IX, § 9(a), Mo. Constitution (1945), the government of the University of Missouri is vested in a board of curators. This has been interpreted to give control over many phases of the university to the board of curators.

We find no other constitutional or statutory provisions which negate the recent authority under § 36.350 as it applies to all other state agencies not specifically discussed above which are non-merit agencies.

With regard to Part b. of your request, and particularly § 36.390.7, we find nothing which would make this section inapplicable to all state agencies except the University of Missouri. It is obvious that the legislature intended to vest certain rights in non-merit employees of all agencies of this state. Section 36.390.5, RSMo Supp. 1979, reads as follows:

Any regular employee who is dismissed or involuntarily demoted for cause or suspended for more than five working days may appeal in writing to the board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension or demotion, the board shall approve or disapprove such action and in the event of a disapproval the board shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as he has lost by reason of such suspension or demotion. After the hearing and consideration of the evidence for and against a dismissal, the board shall approve or disapprove such action and may make any one of the following appropriate orders:

Mr. Stephen C. Bradford

(1) Order the reinstatement of the employee to his former position and the payment to the employee of part or all of such salary as has been lost by reason of such dismissal;

(2) Sustain the dismissal of such employee, unless the board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as has been lost by reason of such dismissal;

(3) Except as provided above the board may sustain the dismissal, but may order the director to recognize reemployment rights for the dismissed employee under section 36.240, in an appropriate class or classes, or may take steps to effect the transfer of such employee to an appropriate position in the same or another division of service.

When you consider the additions of § 36.390.7 and .8 and the language in § 36.390.9, clearly the legislature has vested certain non-merit employees with a right of appeal in the event that they are terminated. That right is defined either in terms of a procedure before the Personnel Advisory Board or, at the option of the employing agency, a procedure similar to those provided for merit employees. The provisions of § 36.390.8 authorize the exclusion of employees in policymaking positions and members of military or law enforcement agencies and employees of academic institutions. Just as the legislature has provided in Chapter 105, RSMo 1978, for a meet and confer law with regard to certain public employees, it does not seem inconsistent with the above-mentioned constitutional provisions that the legislature has provided certain employees with a procedure in the event that they are dismissed. This has nothing to do with their hiring per se. The qualifications and terms of employment may well remain the same. All the legislature has done is to provide for a procedure to make sure that the employer is treating the employee fairly within the terms of his employment. In addition, there is a provision for judicial review under § 36.390.9 in the event that the employee disagrees with the final administrative determination concerning his dismissal. We find nothing repugnant in these provisions to the constitutional authority already vested in the state agencies. Therefore, these procedures, for example, need not apply to the State Highway

Mr. Stephen C. Bradford

Patrol, per se. They are not applicable to the University of Missouri and need not apply to state colleges. We do not believe that the Department of Elementary and Secondary Education, however, is an academic institution in terms of § 36.390; therefore, it would appear applicable to employees of such department, except that § 36.390.8 provides that the procedures adopted under such subsection need not apply to employees in policymaking positions.

You ask further whether formal action by an agency either adopting the procedures of the Personnel Advisory Board with regard to dismissals or adopting similar procedures can be withdrawn at anytime. There appears to be no prohibition as to which course the agencies may choose. Equally, there is no prohibition against changing position as to the procedure to be followed. We do not believe that such procedures must be a rule under Chapter 536, RSMo 1978. We caution, however, that such revocation would not necessarily affect the rights of persons employed during the time such revoked provisions were in effect.

With respect to Part c. of your inquiry, for the reasons above stated, we believe that § 36.510, which provides that the Director of the Division of Personnel shall perform certain functions, is not repugnant to the constitutional authority of the state agencies with the exception of the University of Missouri. We conclude that § 36.510 applies to all agencies except the University of Missouri.

In order to fully attempt to define the scope of the above changes in Chapter 36, we feel it is necessary to comment on whether there was any legislative intent to bring the legislative or judicial branches or the elective offices of the executive branch within the scope of Chapter 36. We note that § 536.010, RSMo 1978, defines state agency to exclude the General Assembly, the courts, and the Governor. While such definition has not been made applicable to the provisions in question, we are of the view that when the legislature spoke of "non-merit agencies of the state," the legislature did not intend to include the legislative or judicial branches or the elective offices of the executive branch of this state. We acknowledge that the legislation did not define "agencies." However, we think the better view is to exclude such branches of government as well as elective offices of the executive branch.

It is further our view that none of the provisions in question here apply to agencies which have a bi-state character.

CONCLUSION

It is the opinion of this office that:

Mr. Stephen C. Bradford

1. Regulations of the Personnel Advisory Board promulgated under § 36.350, RSMo Supp. 1979, apply to all state agencies, merit and non-merit, except the University of Missouri.
2. Dismissal procedures under § 36.390.5, RSMo Supp. 1979, apply to non-merit agencies under § 36.390.7, RSMo Supp. 1979, unless they adopt similar procedures under § 36.390.8, RSMo Supp. 1979, except that such procedures need not apply to employees in policy-making positions, members of the military or law enforcement agencies or employees of academic institutions under § 36.390.8.
3. Agencies subject to § 36.390.7 and not excepted therefrom are not prohibited from changing from one procedure to another in the processing of dismissals. Any procedure so established by a non-merit agency does not need to be formulated as a rule under Chapter 536, RSMo 1978, unless otherwise required by a statute which is peculiar to that agency.
4. Section 36.510, RSMo Supp. 1979, is applicable to all state agencies except the University of Missouri.
5. Sections 36.350, 36.390, and 36.510 are not applicable to the legislative or judicial branches or to elective officials of the executive branch or to agencies having a bi-state character.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,



JOHN ASHCROFT
Attorney General

January 22, 1980

OPINION LETTER NO. 48
(Answer by Letter-Klaffenbach)

The Honorable Ed Bushmeyer
Representative, 83rd District
905 Lami
St. Louis, Missouri 63104

FILED

48

Dear Mr. Bushmeyer:

This letter is in response to your request for an opinion of this office asking:

Whose responsibility is it to pay for repairs to trunk lines under public property which run from the main water line to private property? Is it the responsibility of the Water Division of the City of St. Louis, or the private property owner?

We first wish to note that your question involves a dispute between a private property owner and the City of St. Louis. In this respect it would be inappropriate for this office to issue an official opinion because this office in the issuance of opinions does not perform the function of a court of law. Gershman Investment Corporation v. Danforth, 517 S.W.2d 33 (Mo. Banc 1974).

We note that the Missouri Court of Appeals, Eastern District, in the companion cases of St. Louis Cty. Water Co. v. Public Ser. Com'n and Beaman v. Conway, 579 S.W.2d 633 (Mo.App., E.D. 1979), concluded that an amendment to Senate Bill No. 583 of the 78th General Assembly, which required that certain underground facilities be fully maintained by the "public utility, municipal corporation or other person providing said service" violated the state constitutional provision, § 23 of Art. III, Mo. Const., requiring that the subject of a bill be clearly expressed in its title, and thus, such portion of the bill was void. It is our understanding that the position of the Law Department of the City of St. Louis with respect to your question is that the city's position is "as it has always been, that it is the responsibility of the property owner to pay for repairs to water service lines." The city counselor's office notes a few exceptions

The Honorable Ed Bushmeyer

to this position, most notably for cases where the damage to the service line was caused by city employees. The apparent basis for the city's position is that water service lines are the property of the owners of the premises which are served by them and that the owner of the premises pays for the installation of the water service line, and it thereafter becomes his property.

It thus seems apparent that the question can only properly be set at rest by a court declaration or by appropriate legislation.

Very truly yours,

JOHN ASHCROFT
Attorney General

April 17, 1980

OPINION LETTER NO. 49

(Answer by Letter-Klaffenbach)

The Honorable Harriett Woods
State Senator, 13th District
7147 Princeton Avenue
University City, Missouri 63130



Dear Senator Woods:

This letter is in response to your question asking:

Can separate municipalities consolidate
police departments under one joint board
(abolishing existing separate marshal
and police chief offices) governed by repre-
sentatives of all involved communities?

Clearly a city is a "political subdivision" under § 70.210,
RSMo, and may cooperate with other cities pursuant to the provi-
sions of §§ 70.210, et seq.

Section 70.260, RSMo, provides in pertinent part:

The joint contract may also provide for
the establishment and selection of a
joint board, commission, officer or offi-
cers to supervise, manage and have charge
of such joint planning, development, con-
struction, acquisition, operation or ser-
vice and provide for the powers and duties,
terms of office, compensation, if any, and
other provisions relating to the members
of such joint board, commission, officers
or officer. . . .

Section 70.280, RSMo, provides:

The governing body of any municipality
or political subdivision shall have the

The Honorable Harriett Woods

power to abolish the office of [sic] the facility taken over by any other municipality or political subdivision, and the powers and duties thereof may be transferred to the officer who is to perform them under the terms of the contract or cooperative action.

When the provisions of § 70.260 are read together with the provisions of § 70.280, there is an ambiguity. Read literally, the first part of § 70.280 could mean that the only way to abolish the offices which are taken over would be to transfer the functions to another municipality or political subdivision. Such an interpretation would exclude the abolishment of offices whose functions are taken over by a joint board or commission pursuant to § 70.260. However, we note that the latter portion of § 70.280 states that "the powers and duties thereof [of the office taken over] may be transferred to the officer who is to perform them under the terms of the contract or cooperative action."

Since § 70.260 authorizes the establishment and selection of a joint board, commission, officer or officers to supervise, manage and have charge of such joint planning, operation or service it seems reasonable to conclude that the legislature intended that such officer or officers would assume the duties of the office sought to be abolished. And, as a consequence, that the office taken over would be abolished.

It is a rule of statutory construction that a legislative act must be considered in its entirety and its provisions harmonized, if possible, to give effect to legislative intent. State ex rel. Safety Ambulance Service, Inc. v. Kinder, 557 S.W. 2d 242 (Mo. 1977). Therefore, after so harmonizing the provisions of §§ 70.260 and 70.280, we conclude that separate municipalities may consolidate police departments under one joint board and abolish the existing marshal and police chief offices whose duties and powers are taken over.

It is also our view, however, in view of the importance of this question, the lack of any judicial precedent respecting

The Honorable Harriett Woods

your question, and the fact that we do not perform a judicial function, Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo. 1974), that such a question may best be resolved either by legislative action or judicial determination.

Very truly yours,

JOHN ASHCROFT
Attorney General

TAXATION: Under the provisions of Senate Bill No.
ASSESSMENT: 247, 80th General Assembly, county collectors
are required to deduct from property tax
collections for each taxing authority, except the State, each
authority's share of the estimated costs incurred under
reassessment plans approved by the State Tax Commission.
The first deduction is to be made from taxes due December
31, 1979.

January 15, 1980

OPINION NO. 50

The Honorable Dennis K. Hoffert
Chairman, State Tax Commission
623 East Capitol Avenue
Post Office Box 146
Jefferson City, Missouri 65102



Dear Mr. Hoffert:

This opinion is in response to your question asking:

Does Senate Bill 247, Section 2.2(3),
Vernon's Missouri Legislative Service
1979, No. 2, p. 367, impose the duty
on a county collector to make deduc-
tions from tax collections accruing
to political subdivisions for the
year 1979 to allay reassessment costs
for the succeeding year when the
county's plan for general assessment
has yet to be developed by the county
and approved by the State Tax Commis-
sion?

You also state:

In its last session, the General
Assembly passed Senate Bill No. 247, which
was subsequently signed into law by the
Governor. The Act provides a mechanism
for the partial state funding of reassess-
ment costs. If the county decides to
incur reassessment expenses within 4
specified categories pursuant to a plan

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approved by the State Tax Commission, the political subdivisions of the county must make a proportionate contribution as outlined in S. B. 247. S. B. 247 imposes the duty on the county collector to deduct from tax collections each political subdivision's proportionate share of these reassessment expenses which are included in an approved plan for the county. However, with the possible exception of St. Louis County, no county will have an approved plan prior to January 1980.

The Newton County Clerk has asked whether the deductions from tax collections must be made starting in December, though no reassessment plan has been approved.

Although the legislation to which you refer is in fact a combination of Senate Bill No. 247 and Senate Bills Nos. 333 and 254, we will refer to it here as Senate Bill No. 247, 80th General Assembly.

Section 2 of such law provides:

2. A county ordered to perform a general reassessment by the Commission or a court shall be reimbursed for all reasonable costs expended pursuant to a general reassessment plan approved by the Commission in the manner hereinafter set forth:

.

(3) An additional twenty-five percent from all taxing jurisdictions within the county, including the county but not the state, for reasonable costs actually incurred pursuant to an approved plan which are incurred for the expenses specified in subdivision (4) of this subsection. The amount to be paid by each taxing jurisdiction shall

The Honorable Dennis K. Hoffert

be on the percentage basis that the tax proceeds received by such taxing jurisdiction for the preceding year bears to the total tax proceeds received by all such taxing jurisdictions within the county during that same preceding year. The County Collector shall estimate the costs which will be incurred pursuant to the approved plan for the following year and which are allocable to local taxing jurisdiction [sic]. A percentage of all ad valorem property tax collections allocable to each taxing authority, except the state, based on the percentage basis determined as provided in this subdivision shall be deducted by the collector from the collections of taxes due on December 31 of that year. The collector shall bill any taxing authority collecting its own taxes for that taxing authority's proportionate share of the costs incurred pursuant to the approved plan. Such taxing authority shall pay its proportionate share out of such funds as the governing body of that taxing authority may designate. Funds so deducted or paid shall be deposited in the fund provided for in subsection 7. Any amount which is attributable to deductions under this subdivision remaining in the fund each year after payment of all costs shall be paid to the taxing authorities from which it was derived on the same percentage basis as it was deducted originally.

(4) The additional reimbursement for costs referred to in subdivisions (2) and (3) of this subsection shall be limited to costs approved by the Commission pursuant to an approved plan which are incurred for:
. . . .

The Honorable Dennis K. Hoffert

It is clear that subsection (3) of section 2 of the law provides that the county collector shall estimate the costs which will be incurred pursuant to the approved plan for the following year and which are allocable to local tax jurisdictions. We are advised, however, that at the current time only one county in the state is under an order to submit a plan for general reassessment, i.e., St. Louis County, and the plan which that county has submitted to the commission has not yet been approved. We are also advised that the other counties in the state are currently undergoing a process of hearings, and it is relatively certain that all counties in the state will be ordered to submit general plans for reassessment in 1980 and that expenses will be incurred pursuant to these plans during that year.

In view of your statement that it appears that all counties in the State will be ordered to submit plans for reassessment in 1980 and that expenses will be incurred pursuant to those plans during 1980, it is our opinion that the county collectors are required to make the deduction allocable to each taxing authority, except the State, from collection of taxes due December 31, 1979, based on each collector's estimate of the costs which will be incurred pursuant to the approved plan of his or her county.

The estimate of the costs of an approved plan for 1980 cannot be exactly or precisely determined at present but each collector must make his or her estimate based upon the fact that it appears certain that during 1980 there will be plans approved and expenses incurred pursuant to such plans.

CONCLUSION

It is the opinion of this office that under the provisions of Senate Bill No. 247, 80th General Assembly, county collectors are required to deduct from property tax collections for each taxing authority, except the State, each authority's share of the estimated costs incurred under reassessment plans approved by the State Tax Commission. The first deduction is to be made from taxes due December 31, 1979.

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The foregoing opinion, which I hereby approve, was prepared
by my Assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

CARL:
DENTISTS:
DENTAL BOARD:
REORGANIZATION ACT:

Neither the Division of Professional Registration nor the Department of Consumer Affairs, Regulation and Licensing has the authority to employ, prohibit the employment of, discharge, supervise, set the salaries for, or

otherwise control statutorily authorized employees of the Missouri Dental Board, including, in particular, investigators or inspectors; except, however, the Division of Professional Registration now possesses the authority to employ, direct and control personnel which provide the clerical and other staff services which relate solely to the issuance and renewal of licenses.

November 10, 1980

OPINION NO. 55

The Honorable Paul L. Bradshaw
Senator, District No. 30
Room 426, State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Bradshaw:

This opinion is in response to your inquiry of this office as follows:

To what extent, if any, does the Division of Professional Registration, Department of Consumer Affairs, Regulation and Licensing, have the authority to employ, discharge, supervise, set the salaries for, or otherwise control, employees of the Missouri Dental Board? More specifically, does said Division or Department have any authority to authorize or prohibit the employment by said Board of inspectors or investigators?

We understand this question to have arisen when the Missouri Dental Board was first granted appropriations to employ two investigators for Fiscal Year 1980. These positions were filled by the Missouri Dental Board (hereinafter "Board") without incident on October 1, 1979. One investigator resigned immediately and was replaced by the Board on November 1, 1979, with another investigator. However, the Department of Consumer Affairs, Regulation and Licensing has refused to approve the employment of the additional investigator unless the two investigators work under the supervision of the Chief Investigator for the Division of Professional Registration.

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The Department of Consumer Affairs, Regulation and Licensing believes it possesses the "authority to hire, supervise and terminate investigators, and to allocate investigative personnel in order to maximize efficiency of that investigative function among the individual boards and commissions," based upon the provisions of the Omnibus State Reorganization Act of 1974 (C.C.S.H.C.S.S.C.S., Senate Bill No. 1, First Extra Session, Seventy-Seventh General Assembly) (hereinafter the "Reorganization Act"). The Missouri Dental Board does not believe that the Reorganization Act has superseded the Board's authority to hire and direct investigative staff for the Board. We have received and considered the attachments to your opinion request and the legal memoranda of the interested parties.

We note initially that § 332.041, RSMo, provides in subsection 3 that:

The board . . . may employ and pay agents, investigators, legal counsel and other employees reasonable fees and expenses incurred in rendering services considered by the board to be necessary . . .

Section 332.051.2, RSMo, provides in regard to board investigators that:

Investigators employed by the board shall, among other duties, have the power in the name of the board to investigate alleged violations of this chapter including the right to inspect, on order of the board, dental offices, dental laboratories, dental equipment and instruments with respect to the sanitary conditions and safety thereof.

It is clear that, unless repealed by implication by the Reorganization Act or another provision of law, the Missouri Dental Board has been vested in §§ 332.041 and 332.051.2, RSMo, with the express authority to employ, pay, and direct the duties of investigators for the Board. Likewise, because the duty of conducting inspections is one facet of the duties authorized for Board investigators, and because persons performing inspections fit within the definition of "agents . . . and other employees" of the Board under § 332.041.3, RSMo, the Missouri Dental Board is authorized to employ, pay and direct persons acting in the role of an "inspector" for the Board. To comport with the terminology used in § 332.041 and § 332.051, RSMo, those persons presently performing inspections of the nature described in § 332.051.2, RSMo, should be designated as "investigators".

The Honorable Paul L. Bradshaw

We do not find that the Reorganization Act or any other provision of law has repealed, or delegated away to the Department of Consumer Affairs, Regulation and Licensing or its Division of Professional Registration, the authority of the Missouri Dental Board to employ (and discharge), supervise, set the salaries for, or otherwise control the employment of investigators or other persons acting as "inspectors" for the Board. It is our opinion that the Missouri Dental Board has retained all of its statutory authority to "employ and pay agents, investigators, legal counsel and other employees reasonable fees and expenses incurred in rendering services" for the Board, except those employees performing solely the "clerical and other staff services relating to the issuance and renewal of licenses," which duties have been reassigned to the Division of Professional Registration. We base this opinion upon the terms of the Reorganization Act, the Constitution of Missouri, and state appellate court decisions governing statutory interpretation.

In 1972, Art. IV, § 12, Mo. Constitution was amended to provide for the reorganization of the executive department by, inter alia, the creation of thirteen administrative departments and the Office of Administration, and directed the assignment of the various "boards, bureaus, commissions and other agencies of the state" to one of these departments or the Office of Administration. The Department of Consumer Affairs, Regulation and Licensing was one department so created. Art. IV, § 36(a), Mo. Constitution (as amended 1972), further defines and describes the Department of Consumer Affairs, Regulation and Licensing. We find nothing in the text of Art. IV, §§ 12, 36(a), Mo. Constitution (as amended 1972), which is instructive in specifying how the employees of the various boards and commissions assigned to the Department of Consumer Affairs, Regulation and Licensing shall be supervised and controlled.

To effectuate the provisions of these constitutional amendments, the "Omnibus State Reorganization Act of 1974" (Reorganization Act) was passed. The key provisions of the Reorganization Act which govern this question are found in § 4, concerning the Department of Consumer Affairs, Regulation and Licensing, at subsections 15 and 16. Subsection 15 establishes the Division of Professional Registration, but vests in that division only limited powers, as follows:

15. There is hereby established a division of professional registration in the department of consumer affairs, regulation and licensing, headed by a director appointed by the director of the department. The division shall provide clerical and other

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staff services relating to the issuance and renewal of licenses to all the professional licensing and regulating boards assigned to the division and shall establish a system of accounting and budgeting, in cooperation with the office of administration and the state auditor's office, to insure proper charges are made to the various boards for services rendered to them. The division shall assume the duties required by section 161.242 relating to directories, and all reports shall be filed with the director of the department rather than the commissioner of education.

Subsection 16 transfers the various professional licensing boards, including the Missouri Dental Board, to the Division of Professional Registration by "specific type transfers," in pertinent part as follows:

16. The division of registration and examination, department of education within chapter 161, RSMo, and others, is abolished and the following boards and commissions are transferred by specific type transfers to the division of professional registration, department of consumer affairs, regulation and licensing: . . . Missouri dental board, chapter 332, RSMo; . . . The governor shall appoint members of these boards by and with the advice and consent of the senate from nominees submitted by the director of the department. The boards and commissions assigned to the division shall exercise all their respective statutory duties and powers, except those clerical and other staff services relating to the issuance and renewal of licenses, which shall be provided by the division, within the appropriation therefor. All clerical and other staff services relating to the issuance and renewal of licenses of the individual boards are abolished. Nothing herein shall prohibit employment of professional examining or testing services from professional associations or others as required by the boards or commissions on contract. Notwithstanding any other provision of law the director of the division shall exercise all

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management functions of the boards and commissions, including but not limited to the allocation and assignment of space, personnel and equipment.

We find it significant that the Reorganization Act transfers the various boards and commissions to the Division of Professional Registration by "specific type transfers," rather than by the "type I," "type II," or "type III" transfers defined in Section 1, subsection 7.(1)(a)-(c) of the Reorganization Act. Each of the type I, II or III transfers necessarily involves some loss of authority, power or autonomy by the agency transferred. In type I transfers, the loss of authority is complete; in type II transfers the agency loses substantial authority, power and autonomy, but not all. Even under type III transfers, the agency loses supervisory power over its budgeting and reporting, and any other subject where the head of the department is accorded supervisory authority in the Reorganization Act or later acts. However, the reference to a "specific type transfer" does not vest any of the agency's power, authority or autonomy in the department to which it is assigned. See Section 1, subsection 7.(1)(d) of the Reorganization Act. The use of this "specific type transfer" is limited in the Reorganization Act only to the professional licensing boards within the Department of Consumer Affairs at Section 4.16, and to the transfer of certain statutory authority to the Department of Mental Health at Section 9.3.

This transfer of the Missouri Dental Board to the Division of Professional Registration, without loss of authority by that Board, obtains added significance when considered with the plain language of subsection 4.16 of the Reorganization Act, providing that:

The boards and commissions assigned to the division shall exercise all their respective statutory duties and powers, except those clerical and other staff services relating to the issuance and renewal of licenses, which shall be provided by the division, within the appropriation therefore.
[Emphasis added.]

It appears clear that if a board or commission assigned to the Division of Professional Registration possesses the statutory power to employ and pay investigators and other employees, these provisions of the Reorganization Act have not affected that power, except to transfer the clerical and staff personnel who perform the license issuance and renewal services to the Division of Professional Registration.

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Our previous Op. No. 49, Sikes, 5/4/76, speaks to the issue of what constitutes "clerical and other staff services relating to the issuance and renewal of licenses." It includes the ministerial acts of preparing and mailing the necessary documents to licensees regarding license renewal, processing the checks and documents received for license renewal, the issuance of the new licenses and renewals of existing licenses, the mailing of these licenses to the proper persons, and the establishment of a system of accounting and budgeting pursuant to § 4.15 of the Reorganization Act "to facilitate the license renewals" and issuance of new licenses, so as to aid the professional licensing boards.

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. State v Kraus, 530 S.W.2d 684, 685 (Mo. banc 1975). We believe the express limitation of the transfer to the Division of Professional Registration of "clerical and other staff services relating to the issuance and renewal of licenses" (our emphasis) evidences the legislative intent that executive staff positions, legal counsel, investigators, inspectors and support clerical and administrative staff for these positions remain with the boards and commissions which have the statutory authorization for such positions.

It is suggested that Section 1.6(2) of the Reorganization Act vests the Director of the Department of Consumer Affairs, Regulation and Licensing with authority to control and reallocate the investigative staff of the Missouri Dental Board by its terms:

Unless otherwise provided by this act, the head of each department is authorized to establish the internal organization of the department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the department.

We do not find this provision of the Reorganization Act to govern the boards and commissions assigned to the Division of Professional Registration. State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536-537 (Mo. banc 1979), provides that "[a] specific statute prevails over a general one," and "effect must be given to every clause and section of a statute so that one section will not conflict or destroy another." The specified provisions of Section 4.16 of the Reorganization Act which transfer the boards and commissions by "specific type transfer" and allow them to retain "all their respective statutory duties and powers . . ." constitute

The Honorable Paul L. Bradshaw

a case where it is "otherwise provided by this act," so as to exempt the boards and commissions from control by the director of the department under the quoted portion of Section 1.6(2) of the Reorganization Act. To hold otherwise would cause one general section of the Reorganization Act to conflict with, and supersede, a more specific section of the same act.

We also do not accept the contention that the final sentence of Section 4.16 of the Reorganization Act, providing:

Notwithstanding any other provision of law the director of the division shall exercise all management functions of the boards and commissions, including but not limited to the allocation and assignment of space, personnel and equipment.

allows the division or department director to allocate or assign those persons, employed by the boards or commissions under statutory authority, to the division, or another board or commission, without the consent of the employing board or commission. These provisions of Section 4.16 of the Reorganization Act must be harmonized if reasonably possible. State ex rel. Fort Zumwalt School District v. Dickherber, supra; and State ex rel. Safety Ambulance Service, Inc. v. Kinder, 557 S.W.2d 242, 245 (Mo. banc 1977). We believe the only reasonable way to harmonize these provisions is to hold that the division director may allocate and assign space, personnel and equipment in a physical and ministerial sense, but cannot thereby change or affect the employment relationship between a board and its employee, or transfer or diminish the statutory authority of the board to employ, pay, supervise, control or direct its employee. Op. No. 377, Feigenbaum, 12/31/74, which is inconsistent in part with this opinion, is hereby withdrawn.

We note, in passing, that the Director of the Department of Consumer Affairs, Regulation and Licensing does have the apparent authority under Section 1.6(2) to establish within the Division of Professional Registration an independent investigative unit, should he have appropriations available for this purpose. This would aid a board or commission which lacked the statutory authority to employ investigators, and could assist any board or commission which was unable to investigate pending complaints promptly. However, such an independent investigative unit cannot be established in derogation of a board's statutory right to employ, pay, direct and control its own investigators or inspectors within its appropriations.

The Honorable Paul L. Bradshaw

CONCLUSION

It is the opinion of this office that neither the Division of Professional Registration nor the Department of Consumer Affairs, Regulation and Licensing has the authority to employ, prohibit the employment of, discharge, supervise, set the salaries for, or otherwise control statutorily authorized employees of the Missouri Dental Board, including, in particular, investigators or inspectors; except, however, the Division of Professional Registration now possesses the authority to employ, direct and control personnel which provide the clerical and other staff services which relate solely to the issuance and renewal of licenses.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gregory W. Schroeder.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

February 4, 1980

OPINION LETTER NO. 56
(Answer by Letter-Klaffenbach)

The Honorable Tom R. Williams
Prosecuting Attorney, Johnson County
307 North Holden
Warrensburg, Missouri 64093



Dear Mr. Williams:

This letter is in response to your question asking whether deputy sheriffs are entitled to receive fifteen cents for each mile traveled in criminal cases and investigations under § 57.300, RSMo. Further correspondence from you indicates that you are referring to the sheriff's mileage reimbursement and that the proper section reference is § 57.350, RSMo.

In this respect we refer you to Att'y Gen. Op. No. 161, Pruett, November 27, 1979, and Att'y Gen. Op. Ltr. No. 205, Millan, June 5, 1974. While those opinions refer to third class counties, they are informative in that they point out that § 57.300 is a fee statute and not a reimbursement statute. The proper reimbursement statutes are §§ 57.350 and 57.360, RSMo. The difference between these latter two sections was stated in Att'y Gen. Op. No. 132, Hollingsworth, July 15, 1964, which we quote in part:

Your second question is whether sheriffs and deputies in Second Class counties are entitled to reimbursement for 'criminal investigation mileage'. As we understand your question, it involves necessary traveling expenses incurred in the course of the investigation of crimes, including those in which the culprit is unknown. Inherent in your question is the further basic question of whether such criminal investigation constitutes part of the official duties of a sheriff. In our opinion,

The Honorable Tom R. Williams

this basic question must be answered in the affirmative.

In Maxwell v. Andrew County, 347 Mo. 156, 1.c. 163, 146 SW2d 621, the Supreme Court stated:

'It is true that the sheriff is under a legal duty to investigate alleged crimes and to suppress crime and arrest felons.'

And Section 57.100, RSMo, spells out the duties of sheriffs generally in the following language:

'Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by magistrates.'

We believe that both the Maxwell case and the statutory provisions above quoted impose upon sheriffs and their deputies in Second Class counties the duty of making necessary criminal investigations of the kind mentioned in your letter. The Maxwell case held, however, that absent statutory provision therefor, mileage and expenses incurred in connection with criminal investigations may not be paid to a sheriff. Thereafter, Sections 57.350, RSMo Cum. Supp. 1963, and 57.360, RSMo, were (in their original form) enacted as Sections 7 and 8 of Laws, 1945, page 1569, and these statutes have remained unchanged except as concerns the rate of reimbursement for mileage as set forth in Section 57.350.

The Honorable Tom R. Williams

A study of Section 57.350, RSMo Cum. Supp. 1963, has led us to the conclusion that it has no application to the payment of mileage in criminal investigations. Its purpose is to provide for reimbursement at the specified rate for all miles actually and necessarily traveled in serving summonses, subpoenas, processes, writs and notices. Such mileage is computed from the place where court is usually held (except when court is usually held in more than one place), a provision which would not reasonably have reference to criminal investigations.

However, it is our opinion that Section 57.360, RSMo, does authorize reimbursement, as hereinafter set forth, for travel expenses incurred in criminal investigations. This section provides, in part, as follows:

'The sheriff and his deputies shall be reimbursed out of the county treasury, for actual and necessary traveling expenses, incurred in the performance of their official duties, in addition to the mileage above provided.'

We construe Section 57.360 (which, as above pointed out, was enacted as a part of the same act as the original Section 57.350) to mean that in addition to those situations covered by Section 57.350 in which the sheriff is entitled to reimbursement for actual and necessary mileage expense, the sheriff is also entitled to be reimbursed for his actual and necessary travel expenses incurred in the performance of duties which are not included within the provisions of Section 57.350, and this would, of course, include reimbursement for actual and necessary travel expenses incurred in criminal investigations.

The Honorable Tom R. Williams

Section 57.360 requires the sheriff to make a written claim for reimbursement for his travel expenses, setting forth all detailed and pertinent information specified by the county court in order to approve the payment thereof. Although this statute does not authorize the payment of mileage, as such, it is our opinion that the county court is authorized, in its discretion, to approve a claim for reimbursement for travel expenses either at a rate per mile or actual out of pocket expenses or other reasonable determination which the county court finds under the circumstances will not be in excess of the actual and necessary expenses incurred by the sheriff and his deputies in traveling in the course of making criminal investigations.

There is no limitation on reimbursement under §§ 57.350 or 57.360. A limitation is contained in § 57.430, Senate Bill No. 316, 80th General Assembly, which relates to third and fourth class counties.

Further, we believe that the question with respect to the budget, which is implicit in your correspondence, was resolved by the Missouri Court of Appeals, Western District, in Myers v. Buchanan County, 493 S.W.2d 696 (Mo.Ct.App. 1973). However, you should note that this office differed with respect to the court's interpretation of the provisions of § 57.300 as noted in our Opinion Ltr. No. 161-1979.

We believe this answers your questions.

Very truly yours,

JOHN ASHCROFT
Attorney General

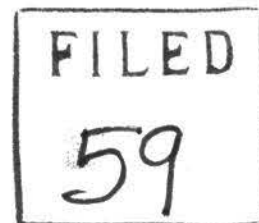
Enclosures:

Att'y Gen. Op. Ltr. No. 161,
Pruett, 11/27/74
Att'y Gen. Op. Ltr. No. 205,
Millan, 6/5/74

April 9, 1980

OPINION LETTER NO. 59
(Answer by Letter-Lindholm)

Mr. Fred A. Lafser, Director
Department of Natural Resources
Post Office Box 176
Jefferson City, Missouri 65102



Dear Mr. Lafser:

In your opinion request you pose the following question:

Can the Missouri Clean Water Commission (CWC) legally award a 15% state grant from the Water Pollution Control Fund to supplement a federal grant to the Metropolitan St. Louis Sewer District (MSD) for the purpose of establishing a minority business enterprise (MBE) program pursuant to the attached Environmental Protection Agency (EPA) policy?

Your request further states that the United States Environmental Protection Agency (EPA) published a final policy on December 26, 1978, "Policy for Increased use of Minority Consultants and Construction Contractors," and states that the policy applies to all grants under Section 201 of the Federal Water Pollution Control Act, 33 U.S.C. § 1281.

Your request characterizes this EPA policy as one requiring all grantees of funds under § 201 to encourage and assist Minority Business Enterprise (MBE) to seek grants or contracts through the grants program, and further that the Metropolitan St. Louis Sewer District (MSD) has proposed an MBE program to insure that MSD will comply with the EPA policy on MBE, which will in turn ensure continuation of MSD projects without substantial delays.

Mr. Fred A. Lafser, Director

The MSD submitted a proposed contract to DNR on February 5, 1979, to employ a consultant to perform an MBE program for MSD, which requested state and federal grants of \$15,000 and \$75,000 respectively. Section V(c) of the EPA "Grants for the Construction of Treatment Works, Policy for Increased Use of Minority Consultants and Construction Contractors," Federal Register, Vol. 43, No. 248, December 26, 1978, states that: "The grantee in its role as a public trustee assumes primary responsibility to achieve an acceptable level of MBE use. This primary responsibility is a basic condition of its grant award."

The EPA, in a letter dated July 24, 1979, signed by Allan S. Abramson, Director, Water Division of Region VII, stated that consultant contracts, such as the contract involved in your request, to assist minority business enterprise participation in construction grant programs are eligible for federal grant funds under § 201. You state that the Clean Water Commission (CWC) approved the \$15,000 state grant conditioned upon a favorable ruling by this office.

The question addressed in your request form, which related to the determination of eligibility by EPA, concerns the \$15,000 grant of state funds. The EPA directives and materials included with the request form address the legality of the program under federal laws, and the duties and obligations of various entities, e.g., grant recipients, contractors, consultants, etc., and not the State of Missouri.

There is not a wealth of Missouri law or authority answering this question and it appears the answer must come primarily from analyses of the Missouri statutes and cases of other jurisdictions. There appears to be no Missouri case law directly on point.

In Art. III, § 37(b), of the Constitution of the State of Missouri, the voters of the State of Missouri authorized the sale of bonds for water pollution control to carry on a program for planning, financing and constructing sewage treatment facilities determined by the legislature. The program was to be performed by the Water Pollution Board (now the CWC).

The legislature in the Missouri Clean Water Law, found in Chapter 204, RSMo, directed the CWC to administer state and federal grants to municipalities and political subdivisions for the planning and construction of treatment works and set forth guidelines for such administration in other sections. Section 204.026(10), RSMo 1978.

Mr. Fred A. Lafser, Director

In Section 204.101, the state is authorized to make grants to political subdivisions to assist them in the construction of:

. . . those portions of water pollution control projects which qualify for federal aid and assistance under the provisions of the Federal Water Pollution Control Act, . . .
(Emphasis added.)

This provides that any portion of a project and all activities that qualify under the federal law will likewise be eligible for grant funds under the Missouri statute. And, in Section 204.106, the legislature has determined that state funds may be provided to:

. . . pay a portion of the construction costs of such projects or portions of projects which qualify for and in conjunction with federal grants as may be received under the provisions of the Federal Water Pollution Control Act, as amended.
(Emphasis added.)

This section again indicates that projects and portions thereof which qualify for federal grants will be eligible for state grant funds. In Section 204.111, the legislature closely linked the use of state funds with federal funds:

The commission is the agency for the administration of such funds as are granted by the state for this program. The administration of the granted funds shall be done in direct conjunction with the administration of federal funds granted for water pollution control projects under the provisions of the Federal Water Pollution Control Act, as amended. (Emphasis added.)

Further indication that the legislature intended to link eligibility of state funds to eligibility under federal funding is found in Section 204.116, wherein the legislature directed that:

Mr. Fred A. Lafser, Director

The commission's determination of the relative need, the priority of projects, and the standards of construction shall be consistent with the provisions of the Federal Water Pollution Control Act, . . . (Emphasis added.)

And, in Section 204.026(15), the commission is authorized to:

Exercise all incidental powers necessary to carry out the purposes of [the Missouri Clean Water Act], to assure that the state of Missouri complies with any federal water pollution control act, retains maximum control thereunder and receives all desired federal grants, aid and benefits; . . . (Emphasis added.)

It therefore appears that where grant funds which are related to sewage control facilities are concerned, the constitution has required the legislature to determine the program for the application of these funds. And the legislature has determined that the application of and eligibility for state grants should closely coordinate with federally approved projects so that ". . . administration of the granted funds shall be done in direct conjunction with the administration of federal funds granted for water pollution control projects. . . ." (Section 204.111 and above cited sections.)

The U.S. EPA has determined the proposed MBE grant is eligible. We believe that the legislature intended by the above statutory provisions to make eligible for grants from state funds any project cost which is eligible for grants under the Federal Water Pollution Control Act and is reasonably related to the treatment facility construction project process.

An examination of cases from Missouri and other jurisdictions support this result. The word "construction" indicates that it is a word of variable meaning which should be construed according to the intent of the provisions in which it may be found. Larson v. Crescent Planning Mill Co., 218 S.W.2d 814, 820 (Mo.App., St. L. 1949).

The United States Supreme Court in United States v. William Cramp and Sons Ship and Engine Building Co., 206 U.S. 118, 27 S.Ct. 676, 678, 51 L.Ed. 983 (1907), refused to employ a narrow definition of the word "construction" which would have rendered valid additional claims submitted by the ship building company

Mr. Fred A. Lafser, Director

after completion of the ship. The claims were barred by application of a broad definition of the term construction in a release signed by the company. The court interpreted a release employing the word "construction" to include not only those claims arising under construction but also those which arose "by virtue of construction." Thus, the context here also was a factor in the broader definition of the word "construction."

The Idaho Supreme Court in Ostrander v. City of Salmon, 117 P. 692 (Idaho S.Ct. 1911), stated that the word "construction" should be broadly construed to imply authority to permit purchase of works which had already been constructed, where this served the purpose of the legislation in question. There, it was a question of whether waterworks could be purchased which had already been constructed, the court ruling in the affirmative. The court reasoned that this construction permitted the intent of the legislature to be accomplished, viz, providing adequate treatment of water supplies.

The Massachusetts Supreme Court in Plymouth Co. Nuclear Information Committee, Inc. v. Energy Facilities Siting Council, 372 N.E.2d 229, 231 (Mass. 1978), broadly construed "construction" to refer back in time when obligations to purchase facilities for the plant were first made in the amount of \$34,727,563 on a total project estimate of \$1,396,000,000, even though no site preparation work had yet taken place.

The Arkansas Supreme Court in Hollis v. Erwin, 374 S.W.2d 828, 833 (Ark. 1964), construed the word "construction" to also include the equipping of a hospital as part of a "single enterprise." The court recognized that a hospital is more than a mere building with four walls and a roof, and thus it was necessary to determine that equipment would be required in the construction process of this "single enterprise" to achieve the purposes of amendments to the Arkansas Constitution. Sewage works projects and all reasonable activities related are a single enterprise, which it may be said the legislature sought to encourage, and this opinion supports a theory that the word "construction" should be broadly construed to accomplish the intent of a law making body.

The Supreme Court of Washington in Seymore v. City of Tacoma, 32 P. 1077, 1080 (Wash. 1893), adopted an implied authority concept to find that more than the mere cost of construction in a narrow sense was to be implied by the use of that word.

Mr. Fred A. Lafser, Director

The Court of Appeals for the Fifth Circuit, in Dobbs v. Costle, 559 F.2d 946, 948 (5th Cir. 1977), construed the word "construction" to go back to early steps such as preparing plans and specifications, doing soil testing and exploratory boring for a sewage treatment plant. This broad interpretation of the word "construction" permitted the city to apply for a 55% federal grant fund because its construction had begun before July 1, 1972, when these activities were included under the concept of construction.

A like theory was applied by the Iowa Supreme Court in Slapnicka v. City of Cedar Rapids, 139 N.W.2d 179, 182 (Iowa 1965), to permit the City of Cedar Rapids to apply funds which by statutory direction were to be used only for the "construction" of roads and streets, to pay for preliminary engineering services in contemplation of building an expressway, against the contention that such services were not sufficiently related to construction. The Court stated:

'It is fair to say the intent of the term "construction" as used in the [constitutional] amendment includes all things necessary to the completed accomplishment of a highway for all uses properly a part thereof.' [Citation omitted.]

Thus, considering what must have been the legislative intent to do all things necessary to accomplish the completion of sewage treatment works projects, it is fair to say that this intent would include all of those services necessarily related to construction as construed by EPA in the instant situation. It appears that the consulting services to ensure efficient employment of minority business enterprises would be reasonably related to the construction project. The EPA has determined that the MBE program is grant eligible. And, further, the legislature in the cited provisions, indicated its intent to link the application of state construction grant funds to the eligibility of a project for funding under federal statutes. Hence, it is the view of this office that the Missouri Clean Water Commission may award a 15% state grant to the Metropolitan St. Louis Sewer District to establish an effective minority business enterprise program.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65101

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 12, 1980

OPINION LETTER NO. 61

The Honorable Flavel J. Butts
Representative, District 132
Box 216
Camdenton, Missouri 65020

Dear Mr. Butts:

This letter is in response to your question asking whether, under § 139.031.4, RSMo, the various taxing authorities, county court, schools, library districts, ambulance districts, etc., should make moneys available to the collector for refunds on erroneous payments of personal property tax. Section 139.031.4 provides:

All the county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The county court, or other appropriate body or official, shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise.

The Honorable Flavel J. Butts

This statute means simply that when a proper claim for a refund is made to the collector by a taxpayer, the taxing bodies will pay the collector, from the appropriate funds, the sums necessary to make the refund.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

LIQUOR: A temporary caterer's permit may be issued by the Missouri Division of Liquor Control to a qualified applicant under § 311.485, RSMo, even though the premises involved are already licensed to a different licensee under other provisions of the state liquor laws.

May 20, 1980

OPINION NO. 62

The Honorable F. M. Wilson
Director, Dept. of Public Safety
621 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Wilson:

This is in response to your request for an official opinion from this office concerning the following question:

If a premise is already licensed by someone to sell intoxicating liquor or non-intoxicating beer for consumption on the premises, can a temporary caterers permit be issued to someone else for this premise, considering that all other requirements of Section 311.485, RSMo 1978, are met?

A temporary caterer's permit is issued pursuant to § 311.485, RSMo 1978, which provides as follows:

1. The supervisor of liquor control may issue a temporary permit to caterers and other persons holding licenses to sell intoxicating liquor by the drink at retail for consumption on the premises pursuant to the provisions of this chapter who furnish provisions and service for use at a particular function, occasion or event at a particular location other than the licensed premises, but not including a 'festival' as defined in chapter 316, effective for a period not to exceed one hundred twenty consecutive hours, which shall authorize the service of

The Honorable F. M. Wilson

alcoholic beverages at such function, occasion or event during the hours at which alcoholic beverages may lawfully be sold or served upon premises licensed to sell alcoholic beverages for on-premises consumption in the incorporated city in which is located the premises in which such function, occasion or event is held. For every permit issued pursuant to the provisions of this section, the permittee shall pay to the director of revenue the sum of ten dollars for each calendar day, or fraction thereof, for which the permit is issued.

2. All provisions of the liquor control law and the ordinances, rules and regulations of the incorporated city in which is located the premises in which such function, occasion or event is held, shall extend to such premises and shall be in force and enforceable during all the time that the permittee, its agents, servants, employees, or stock are in such premises. This bill will not include the sale of packaged goods covered by this temporary permit.

It is apparent from a reading of the above statute that in order to be eligible for a temporary caterer's permit, the applicant must already possess a retail by drink license issued pursuant to Chapter 311, RSMo. The applicant, if granted the caterer's license, must also furnish "provisions and service" to an event which is held at a specified location other than the premises described in the applicant's state liquor license. The license to be issued shall remain in effect for a period not to exceed one hundred twenty (120) consecutive hours and the event or function must be held at a location within an incorporated city.

The above statute does not specifically define function, occasion or event but does specifically exclude a "festival" as defined in § 316.150, RSMo.

The Honorable F. M. Wilson

An examination of the Missouri Liquor Control Law reveals a possible conflict between §§ 311.485 and 311.240, RSMo. Section 311.240 provides:

1. On approval of the application and payment of the license tax provided in this chapter, the supervisor of liquor control shall grant the applicant a license to conduct business in the state for a term to expire with the thirtieth day of June next succeeding the date of such license. A separate license shall be required for each place of business. Of the license tax to be paid for any such license, the applicant shall pay as many twelfths as there are months (part of a month counted as a month) remaining from the date of the license to the next succeeding July first. (Emphasis added).

* * *

The legislative intent behind the above statute was apparently to limit the number of licenses to be issued to a liquor establishment to one per establishment. See also, 11 CSR 70-2.120(2).

The courts of this state have adopted the rule of construction that where one statute deals with a subject matter in general and comprehensive terms and another deals with the same subject matter in a more minute and definite way, the special and definite statute would prevail over the general statute. As stated in Laughlin v. Forgrave, 432 S.W.2d 308, 313 (Mo. banc 1968):

[1] The rule is: "'Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special

The Honorable F. M. Wilson

statute is later, it will be regarded as an exception to, or qualification of, the prior general one * * *." State ex rel. McKittrick v. Carolene Products Co., 346 Mo. 1049, 144 S.W.2d 153, 156 [5]; 50 Am.Jur., Statutes, § 367, p. 371.

Applying the above rules of construction, we conclude that § 311.485 is a specific law respecting temporary caterer's permits, which was enacted after the enactment of § 311.240, relating to licenses, and therefore § 311.485 controls even if there is an inconsistency between it and § 311.240.

Further, applying such rules of construction, we believe that a temporary caterer's permit may be issued for premises, if the requirements of § 311.485 are met, where the particular premises are licensed (to a licensee other than the applicant for a temporary caterer's permit) for a "lesser" grade of intoxicating liquor than that which is authorized to be sold by the caterer despite an arguable conflict between § 311.485 and §§ 311.270 and 312.430, RSMo.

CONCLUSION

It is the opinion of this office that a temporary caterer's permit may be issued by the Missouri Division of Liquor Control to a qualified applicant under § 311.485, RSMo, even though the premises involved are already licensed to a different licensee under other provisions of the state liquor laws.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

DEPARTMENT OF MENTAL HEALTH:

The Department of Mental Health has the authority to create the "patient's trust fund" by

C.C.S.H.B. 1724, Sections 630.305 through 630.315, 80th General Assembly. The Department of Mental Health has the authority to expend funds from the "patient's trust fund" either to provide patients or residents "easy access" to their funds or to spend the funds as representative payee or other fiduciary under public or private benefit arrangements. The Department of Mental Health has the authority under Sections 630.305 through 630.315 to administer the "patient's trust fund" without the approval or supervision of any other state agency.

October 28, 1980

OPINION NO. 63

Honorable Wayne Goode
State Representative, District 68
7335 Huntington Drive
Normandy, Missouri 63121

Dear Representative Goode:

This official opinion is issued in response to your request for rulings on the following questions:

1. By what authority did the Department of Mental Health create the 'Patient's Trust Fund'?
2. Does the Department of Mental Health have authority to expend funds from the 'Patient's Trust Fund'?
3. If the fund is lawfully created, may the Department of Mental Health administer the 'Patient's Trust Fund' without the approval or supervision of any other state agency?

You have stated the following facts which give rise to your question:

The Department of Mental Health has created a 'Patient's Trust Fund'. The State Auditor has described the 'Patient's Trust Fund' as:

A fund for the deposit and safekeeping of individual patient's monies. Receipts include third-party payments, such

Honorable Wayne Goode

as Social Security and Veterans Administration benefits, and medical insurance claim payments and disbursements are primarily withdrawals by patients. The agency, as guardian for certain financially irresponsible patients, receives monies and makes disbursements on these patients' behalf for board and care, clothing, furniture, personal appliances, and other items.

The General Assembly has made no appropriation to this trust fund.

The Department of Mental Health is part of the executive branch of state government. Monies are withdrawn from this fund without the approval or involvement of any other department or agency.

In C.C.S.H.B. 1724, Sections 630.305 through 630.315, 80th General Assembly, the residential facilities of the Department of Mental Health are given the authority under certain procedures to manage their patients' or residents' funds. These sections read as follows:

630.305. 1. For purposes of this section, the term 'money' includes any legal tender, note, draft, certificate of deposit, stock, bond, check or credit card.

2. A department residential facility may require that all money which is on the person of a patient or resident, which comes to a patient or resident, or which the facility receives in place of the patient or resident under a benefit arrangement or otherwise be turned over to the facility for safekeeping. The money shall be accounted for in the name of the patient or resident and recorded periodically in the records of the patient or resident. Upon request, money accounted for in the name of the patient or resident shall be turned over to a legal guardian of the patient or resident, if the guardian has such authority, or to the parent of the patient or resident if the patient or resident is a minor.

3. A patient or resident of a department facility shall have easy access to the money in his account and may keep and be allowed to spend a reasonable sum for canteen expenses and small purchases. He may spend or

Honorable Wayne Goode

otherwise use the money as he chooses, except as provided in subsection 4 of this section. With the approval of the department, the facility shall establish written policies and procedures giving patients and residents easy access to the money in their accounts and allowing the money to be spent or otherwise used as the patients or residents choose.

4. A department facility may deny a patient or resident the access to and ability to spend or otherwise use the money in his account if it determines that the denial is essential in order to prevent the patient or resident from significantly dissipating his assets or that reasonable restrictions are necessary to protect the patient, resident or others. The department shall establish policies and procedures governing such determinations, including the evidence necessary to support a denial of the patient's or resident's rights. If a denial is made, the patient or resident may continue to spend or otherwise use the money in ways which would not constitute significant dissipation of the assets and which would sufficiently protect himself or others.

5. The department facility shall deposit money accounted for in the name of a patient or resident with a financial institution. Any earnings attributable to money in the account of a patient or resident shall be credited to that account. Under sections 110.070 to 110.110, RSMo, the department shall receive bids from banking corporations, associations or trust companies which desire to be selected as depositories of the department for patients' and residents' moneys.

6. The department shall deliver to the patient or resident, his guardian, if he is incompetent, or his parent, if he is a minor, all money, including any earnings, in the patient's or resident's account upon release from the facility; except that the department may continue to serve as a depository for the money in the account of a patient or resident who is placed through the department's placement program.

7. The department shall establish policies and procedures designed to insure that money in the accounts of patients and residents is safeguarded against theft, loss or misappropriation. The department shall guarantee against theft, loss or misappropriation the principal amounts in any patient's or resident's account.

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630.310. A department residential facility may accept funds which a parent, guardian or other person wishes to provide for the use or benefit of a patient or resident of the facility. The possession and use of such funds shall be governed by section 630.305 and by any additional directions given by the provider of the funds.

630.315. A department residential facility may accept an appointment to serve as representative payee or fiduciary, or in a similar capacity for payments to a patient or resident under a public or private benefit arrangement. Funds so received shall be governed by section 630.305, except to the extent that laws or regulations governing payment of the benefits provide otherwise.

Concerning your first question, the Department of Mental Health has a consolidated bank account as described in the Auditor's report comprised of the individual patient or resident accounts authorized by C.C.S.H.B. 1724, Sections 630.305 through 630.315, 80th General Assembly, at the facilities of the Department. The facility's accounts are consolidated to increase the income earned for the patients and residents. The consolidation also facilitates uniform department-wide procedures.

Under Subsection 5 of Section 630.305, supra, the Department of Mental Health shall receive bids from banking corporations, associations or trust companies which desire to be selected as depositories of the patients' and residents' monies. Sections 110.070 to 110.110, RSMo, are incorporated to provide a procedure for selecting depositories for these monies which the Department of Mental Health holds in trust for its patients and residents. The procedures are the same as the procedures for other public funds held by state institutions.

Thus, the Department of Mental Health has the authority to create the "patient's trust fund," as described in the Auditor's report under the authority of Section 630.305.

As to your second question, the Department of Mental Health has the authority to spend funds from the "patient's trust fund" on behalf of the patients for whom it serves as representative payee or in other fiduciary capacities. The Department facility could be appointed to serve as representative payee or fiduciary for veterans, railroad retirement, social security, and other benefits. These procedures are authorized by C.C.S.H.B. 1724, Section 630.315, 80th General Assembly.

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Furthermore, the Department of Mental Health facility may be named as trustee by a member of a family who has made a payment or gift of money for the benefit of a patient or resident. These arrangements are authorized by C.C.S.H.B. 1724, Section 630.310, 80th General Assembly.

Under Subsection 3 of Section 630.305, patients or residents of facilities of the Department of Mental Health shall have easy access to money in their accounts to spend or otherwise use the money as they choose. The facilities may deny patients or residents the access to their accounts if any facility determines that such a denial is essential to prevent any patient or resident from significantly dissipating his assets or to reasonably restrict the account to protect the patient, resident or others. Subsection 4 of Section 630.305.

Under the authority granted to it in Sections 630.305 through 630.315, the Department of Mental Health may administer the "patient's trust fund" without the approval or supervision of any other state agency because no provision is made for such other approval or supervision. Of course, the administration of the accounts would be subject to audit by the State Auditor under Chapter 29, RSMo.

CONCLUSION

Therefore, it is the opinion of this office that the Department of Mental Health has the authority to create the "patient's trust fund" by C.C.S.H.B. 1724, Sections 630.305 through 630.315, 80th General Assembly. The Department of Mental Health has the authority to expend funds from the "patient's trust fund" either to provide patients or residents "easy access" to their funds or to spend the funds as representative payee or other fiduciary under public or private benefit arrangements. The Department of Mental Health has the authority under Sections 630.305 through 630.315 to administer the "patient's trust fund" without the approval or supervision of any other state agency.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Reginald H. Turnbull.

Very truly yours,



JOHN ASHCROFT
Attorney General

January 9, 1980

OPINION LETTER NO. 64
(Answer by Letter-Klaffenbach)

The Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Courthouse
Fulton, Missouri 65251



Dear Mr. Hamilton:

This letter is in response to your questions asking:

- A. When a city, which is not a constitutional charter city has entered into a contract with a county collector, a county clerk and the county court of a second class county, whereby the county collector is to collect all property taxes for the city, are the proceeds of the contract payable to the county collector individually or are they payable into the general revenue of the county?
- B. If the said proceeds are payable into the general revenue of the county, may the proceeds or any part of them, be distributed as salary to the county collector?

We note that you refer to a city of the third class, and it is clear that such cooperative action is authorized by the statutes. § 77.370, RSMo.

It is also clear that there is express statutory authorization for the collector of a second class county to be paid additional compensation where there is such a contract involving a constitutional charter city. § 52.420.3, RSMo. However, the city you refer to is not a constitutional charter city.

The Honorable C. E. Hamilton, Jr.

In Att'y Gen. Op. No. 23, Kuhlman, January 21, 1970, this office concluded, among other things, that any consideration paid pursuant to a cooperative agreement contract for the extension of taxes between the county clerk of Clay County and the municipalities of Clay County must be paid into the county treasury. Likewise, in Att'y Gen. Op. No. 530, McKenzie, December 10, 1970, this office concluded, among other things, that all compensation paid by the City of Hannibal for the services of the assessor, his deputies and clerks under a similar cooperative agreement, are required to be paid to Marion County and deposited in the county treasury. We enclose copies of these opinions.

It is therefore our view that the money which the county collector receives pursuant to such contract must go into the county treasury.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures

Att'y Gen. Op. No. 23,
Kuhlman, 1/21/70
Att'y Gen. Op. No. 530,
McKenzie, 12/10/70

February 8, 1980

OPINION LETTER NO. 65
(Answer by Letter-Klaffenbach)

The Honorable Philip R. Pruett
Prosecuting Attorney
Mississippi County
Post Office Box 449
Charleston, Missouri 63834



Dear Mr. Pruett:

This letter is in response to your request for an opinion of this office asking whether a third class county sheriff is entitled to reimbursement for transportation expense incurred in transporting prisoners to the penitentiary under § 57.290 (4) or § 57.430, RSMo, and also asking whether a guard, either a deputy sheriff or otherwise, is entitled to reimbursement under either of these sections. You also ask about reimbursement of the expense of feeding the prisoner while en route.

We are enclosing several prior opinions of this office, listed below, with respect to your question which are self-explanatory.

We note that § 57.290 was amended by House Bill No. 148 of the 80th General Assembly and § 57.430 was amended by Senate Bill No. 316 of the 80th General Assembly, although these amendments do not affect our prior interpretations of these sections.

We reaffirm the holdings of these opinions and conclude that § 57.290 is a fee statute, and fees collected under it should be paid into the county treasury. Section 57.430 is a reimbursement statute under which the sheriff and his deputies are paid actual and necessary expenses for each mile traveled in serving warrants or other criminal process not to exceed twenty cents per mile. Section 57.430 is applicable to the transportation of prisoners to the penitentiary and the procedure provided therein must be followed.

The Honorable Philip R. Pruett

With respect to your question concerning reimbursement of a deputy sheriff or a sheriff for expense incurred for feeding a prisoner while en route, our review of this subject leads us to conclude that such expense reimbursement is not covered by § 57.430 and is not presently covered by the provisions of Chapter 221, RSMo, with respect to jailers. We therefore know of no express statutory authority for such reimbursement. However, we believe that reasonable expenses incurred in the feeding of prisoners while transporting them are expenditures which are reimbursable by the county under the doctrine of Rinehart v. Howell County, 153 S.W.2d 381 (Mo. 1941), because such expenses are clearly necessary and indispensable expenses.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures

Att'y Gen. Op. No. 161,
Pruett, 11/27/79
Att'y Gen. Op. No. 205,
Millan, 6/5/74
Att'y Gen. Op. No. 449,
Vaughn, 10/15/69
Att'y Gen. Op. No. 57,
Massey, 2/23/50
Att'y Gen. Op. No. 86,
Sturgis, 12/20/49
Att'y Gen. Op. No. 221,
Gorman, 5/9/68

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

March 3, 1980

OPINION LETTER NO. 66

The Honorable Leroy Blunt
Representative, District 145
Route 1, Box 251
Strafford, Missouri 65757

Dear Mr. Blunt:

This letter is in response to your request for an opinion asking whether a senior citizen complex, which is a not-for-profit corporation and is specifically built for housing lower-income people in the sixty-five year and older age bracket, is exempt from property taxes.

You also state:

Four such complexes exist in Webster County. They were built and are being operated in accordance with the rules and regulations stipulated by FHA. Because they are a non-profit organization and provide housing for low income people over 65 they feel they should not pay real estate taxes.

It is our view that the recently decided case of Franciscan Tertiary Province v. State Tax Commission, 566 S.W.2d 213 (Mo. banc 1978), is applicable to the question that you present. For your convenience, we have enclosed a copy of the court's opinion in that case.

We do not have the details concerning the organization of which you speak, and we do not purport to determine whether such a not-for-profit corporation would be tax exempt under the rule of Franciscan Tertiary Province v. State Tax Commission. However, it seems clear that, if the organization meets the requirements stated in that case, it would be eligible for such tax exemption. Clearly the determination of tax exempt status must

The Honorable Leroy Blunt

be made in each individual case and cannot be assumed merely from the fact that the organization involves a senior citizen complex and is organized under the not-for-profit corporation statutes.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN ASHCROFT
Attorney General

Enclosure

Copy Court's Opinion
566 S.W.2d 213 (Mo.Banc 1978)

LIQUOR: Missouri statutes prohibit licensed liquor establishments from dispensing liquor during certain hours on the primary election day, the first Tuesday after the first Monday in August of even-numbered years, and the general election day, the first Tuesday after the first Monday in November of even-numbered years.

March 28, 1980

OPINION NO. 67

F. M. Wilson, Director
Department of Public Safety
621 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This is in response to your request for an official opinion of this office concerning the question of whether the reference to "primary and general election" in Senate Bill 192, 80th General Assembly, refers only to the biennial August primary and November general election or whether it refers to any primary or general election day of any state, county, municipality, school district or special district.

Senate Bill No. 192 which became effective on January 1, 1980, amended §§ 311.290 and 311.480, RSMo 1978. These amended sections are now in the 1979 Supplement to the Revised statutes of Missouri. Prior to the passage of this bill, the relevant language of these statutes provided as follows:

Section 311.290, RSMo 1978, provided as follows:

No person having a license under this law nor any employee of such person shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity between the hours of 1:30 a.m. and 6:00 a.m. on weekdays and between the hours of 1:30 a.m. Sunday and 6:00 a.m. Monday, or after 1:30 a.m. upon the day of any general, special or primary election in this state at which candidates for public office are elected or nominated or after 1:30 a.m. upon the day of any county, township, city, town or municipal election at which candidates for public office are elected or nominated,

F. M. Wilson

and if said person has a license to sell intoxicating liquor by the drink, his premises shall be and remain a closed place as defined in this section after 1:30 a.m. upon the day of any general, special or primary election in this state at which candidates for public office are to be elected or nominated or after 1:30 a.m. upon the day of any county, township, city, town or municipal election at which candidates for public office are to be elected or nominated and between the hours of 1:30 a.m. and 6:00 a.m. on weekdays and between the hours of 1:30 a.m. Sunday and 6:00 a.m. Monday; except that the sale of intoxicating liquor may be resumed and the premises reopened on any such election day after the expiration of thirty minutes next following the hour of time fixed by law for the closing of the polls at any such election. Where such licenses authorizing the sale of intoxicating liquor by the drink are held by clubs or hotels, this section shall apply only to the room or rooms in which intoxicating liquor is dispensed; and where such licenses are held by restaurants whose business is conducted in one room only and substantial quantities of food and merchandise other than intoxicating liquors are dispensed, then the licensee shall keep securely locked during the hours and on the days herein specified all refrigerators, cabinets, cases, boxes and taps from which intoxicating liquor is dispensed. A 'closed place' is defined to mean a place where all doors are locked and where no patrons are in the place or about the premises. Any person violating any provision of this section shall be deemed guilty of a misdemeanor.
(Emphasis added).

Section 311.480, RSMo 1978, provided as follows:

1. It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on or about said premises between 10:00 p.m. and 6:00 a.m. the following day, without having a license as in this section provided.

* * *

F. M. Wilson

3. The drinking or consumption of intoxicating liquor shall not be permitted in, upon or about the licensed premises by any person under twenty-one years of age, or by any other person between the hours of 1:30 a.m. and 6:00 a.m. on any week day, and between the hours of 12:00 midnight Saturday and 12:00 midnight Sunday, or on the day of any general, special, or primary election in this state, or upon any county, township, city, town, or municipal election day during the hours the polls are legally open. Licenses issued hereunder shall be conditioned upon the observance of the provisions of this section and the regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink. The provision of this section regulating the drinking or consumption of intoxicating liquor between certain hours and on election day and Sunday shall apply also to premises licensed under this chapter to sell intoxicating liquor by the drink. In any incorporated city having a population of more than twenty thousand inhabitants, the board of aldermen, city council or other proper authorities of incorporated cities may, in addition to the license fee herein required, require a license not exceeding three hundred dollars per annum, payable to said incorporated cities, and provide for the collection thereof; make and enforce ordinances regulating the hours of consumption of intoxicating liquors on premises licensed hereunder, not inconsistent with the other provisions of this law, and provide penalties for the violation thereof. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license thereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village.

* * *

F. M. Wilson

One of the effects of these amendments was to remove the language in the above statutes concerning "the day of any county, township, city, town or municipal election" and "the day of any . . . special . . . election." The relevant language of these statutes now provides as follows:

Section 311.290, RSMo Supp. 1979, provides as follows:

No person having a license under this law, nor any employee of such person, shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity between the hours of 1:30 a.m. and 6:00 a.m. on weekdays and between the hours of 1:30 a.m. Sunday and 6:00 a.m. Monday, or after 1:30 a.m. upon the day of any general or primary election in this state at which candidates for public office are elected or nominated. If the person has a license to sell intoxicating liquor by the drink, his premises shall be and remain a closed place as defined in this section after 1:30 a.m. upon the day of any general or primary election in this state at which candidates for public office are to be elected or nominated and between the hours of 1:30 a.m. and 6:00 a.m. on weekdays and between the hours of 1:30 a.m. Sunday and 6:00 a.m. Monday; except that the sale of intoxicating liquor may be resumed and the premises reopened on any general or primary election day after the expiration of thirty minutes next following the hour or time fixed by law for the closing of the polls at any such election. Where such licenses authorizing the sale of intoxicating liquor by the drink are held by clubs or hotels, this section shall apply only to the room or rooms in which intoxicating liquor is dispensed; and where such licenses are held by restaurants whose business is conducted in one room only and substantial quantities of food and merchandise other than intoxicating liquors are dispensed, then the licensee shall keep securely locked during the hours and on the days specified in this section all refrigerators, cabinets, cases, boxes and taps from which intoxicating liquor is dispensed. A 'closed place' is defined to mean a place where

all doors are locked and where no patrons are in the place or about the premises. Any person violating any provision of this section shall be deemed guilty of a class A misdemeanor. Nothing in this section shall be construed to prohibit the sale or delivery of any intoxicating liquor during any of the hours or on any of the days specified in this section by a wholesaler licensed under the provisions of section 311.180 to a person licensed to sell the intoxicating liquor at retail. (Emphasis added.)

Section 311.480, RSMo Supp. 1979, provides as follows:

1. It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on, or about the premises between 10:00 p.m. and 6:00 a.m. the following day, without having a license as in this section provided.

* * *

3. The drinking or consumption of intoxicating liquor shall not be permitted in, upon, or about the licensed premises by any person under twenty-one years of age, or by any other person between the hours of 1:30 a.m. and 6:00 a.m. on any weekday, and between the hours of 12:00 midnight Saturday and 12:00 midnight Sunday, or on the day of any general or primary election in this state during the hours the polls are legally open. Licenses issued hereunder shall be conditioned upon the observance of the provisions of this section and the regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink. The provision of this section regulating the drinking or consumption of intoxicating liquor between certain hours and on election day and Sunday shall apply also to premises licensed under this chapter to sell intoxicating liquor by the drink. In any incorporated city having a population of more than twenty thousand

F. M. Wilson

inhabitants, the board of aldermen, city council, or other proper authorities of incorporated cities may, in addition to the license fee required in this section, require a license not exceeding three hundred dollars per annum, payable to the incorporated cities, and provide for the collection thereof; make and enforce ordinances regulating the hours of consumption of intoxicating liquors on premises licensed hereunder, not inconsistent with the other provisions of this law, and provide penalties for the violation thereof. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a tax-paying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village. (Emphasis added).

* * *

The dates of the general and primary election days in Missouri are set forth in § 115.121, RSMo 1978, which provides as follows:

1. The general election day shall be the first Tuesday after the first Monday in November of even-numbered years.
2. The primary election day shall be the first Tuesday after the first Monday in August of even-numbered years.
3. The election day for the election of political subdivision and special district officers shall be the first Tuesday in April each year; and shall be known as 'municipal election day'.

It is possible by reading §§311.290 and 311.480, as amended, to arrive at the conclusion that the general or primary elections as stated therein would apply to any county, township, city, town or municipal elections. However, when these statutes are read in light of the wording of the statutes prior to the amendment, it is clear that the primary or general election day as stated therein refers to the primary or general

F. M. Wilson

election as provided in § 115.121, RSMo 1978. Moreover, pursuant to Paragraph 3 of § 115.121, RSMo 1978, the election days of political subdivisions and special district officers are specifically referred to as "municipal election day" thus distinguishing such dates from the primary and general election dates set forth in Paragraph 1 and 2. In arriving at this conclusion, we note that the courts of this state have long followed the rule of construction that the legislature by amending a statute will be presumed not to have intended a needless or useless act. State v. Mosman, 315 S.W.2d 209, 211 (1958); Darrah v. Foster, 355 S.W.2d 24, 30 (1962); Protection Mutual Insurance Co. v. Kansas City, 504 S.W.2d 127, 132 (1974).

As stated in Wright v. J. A. Tobin Construction Co., 365 S.W.2d 742, 744 (Mo.App., K.C. 1963):

In ascertaining the legislative intent as expressed in a statute courts are aided by certain well established rules. One such rule is that in the construction of statutes it is presumed that the legislature is aware of the interpretation of existing statutes placed thereon by the states' appellate courts, and that in amending a statute or enacting a new one on the same subject it is ordinarily the intent of the legislature to effect some change in the existing law. If this were not so the legislature in amending a statute would be accomplishing nothing, and legislatures are not presumed to have intended a needless and useless act. . . .

Thus, it is apparent that the effect of these amendments is to prohibit licensed liquor establishments from dispensing liquor during certain hours on primary and general election days as defined in § 115.121, RSMo 1978.

It should be noted that this conclusion does not reflect any opinion on the validity of city ordinances requiring licensed liquor establishments to remain closed on dates other than those set forth in §§ 311.290 or 311.480, RSMo 1978, as amended.

CONCLUSION

It is the opinion of this office that Missouri statutes prohibit licensed liquor establishments from dispensing liquor during certain hours on the primary election day, the first

F. M. Wilson

Tuesday after the first Monday in August of even-numbered years, and the general election day, the first Tuesday after the first Monday in November of even-numbered years.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Cary Augustine.

Very truly yours,

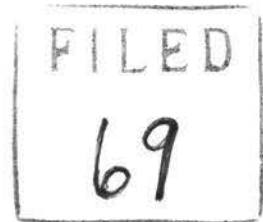
A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

February 5, 1980

OPINION LETTER NO. 69
(Answer by Letter-Wieler)

Honorable Joe Moseley
Boone County Prosecutor
Boone County Courthouse, 2nd Floor
8th and Walnut
Columbia, Missouri 65201



Dear Mr. Moseley:

This letter is in response to your request for an opinion on the following question:

In a situation where a taxpayer pays his taxes without protest before the delinquency date, and later files a written protest, also before the delinquency date, is the protest valid or may the monies be disbursed as if there were no protest?

It is our understanding that this question has arisen because several taxpayers in your county have paid their merchant's and manufacturer's taxes for the year 1979 without filing a protest at the time of payment. However, at a later date, the same taxpayers have filed written protest with the county collector.

Attached for your consideration is a copy of Opinion No. 97, issued February 10, 1970, to the Honorable Urban C. Bergbauer, Jr., Prosecuting Attorney of Iron County. This opinion discusses the ramifications of § 130.031, RSMo 1978, and concludes that it is mandatory for a taxpayer to file suit to compel refund of taxes paid under protest in accordance with the provisions of §§ 1, 2 and 3; but that § 4 authorizes refund by the collector of any real

Honorable Joe Moseley

or tangible personal property tax mistakenly or erroneously paid. The Supreme Court of Missouri has stated that § 139.031 is clear and unambiguous on its face. In Xerox Corp. v. Travers, 529 S.W.2d 418, 422 (Mo. banc 1975), the court outlines the responsibility of a taxpayer desiring to use said section as follows:

Any taxpayer desiring to pay taxes under protest (under 139.031) and to avail himself of the benefits thereunder, shall file his statement with the collector at the time of paying such taxes. (Emphasis added.)

The critical question then is the responsibility of the county collector in view of the failure of the taxpayers to file a written protest at the time of paying the taxes in question. In our view, subsection 2 of § 139.031 only requires the collector to impound in a separate fund all taxes paid under protest in accordance with the provisions of the statute. Section 1 explicitly states that any ". . . taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. . . ." Under the facts outlined in your request, taxpayers have paid their entire tax for the year 1979 without filing a protest at the time of such payment. Under these circumstances, the collector is obligated to disburse said moneys in accordance with the purposes for which collected. He is not required to withdraw them from the general account or accounts upon the filing of a subsequent protest.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure
Atty Gen. Op. No. 97,
Bergbauer, 2/10/70

January 30, 1980

OPINION LETTER NO. 71
Answer by letter-Lowry

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
6th Floor, Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's State Plan for Part B of the Education of the Handicapped Act as amended by P.L. 94-142 for the fiscal years 1981-1983, inclusive.

Our review has taken into consideration the Education of the Handicapped Act, as amended (20 U.S.C. §§ 1401, et seq., as amended), and the regulations promulgated pursuant thereto (45 CFR Part 121A), Art. IX, §§ 1(a), 2(a), and 2(b), Mo. Constitution (1945); §§ 161.092 and 162.670 to 162.995, RSMo 1978, as amended, and related provisions.

Based on this review, it is the opinion of our office that:

1. The Missouri State Department of Elementary and Secondary Education is the state educational agency as defined in 20 U.S.C. § 1401(7) and has the authority under state law to submit the State Plan and to administer or supervise the administration of the Plan.

2. All the provisions of the Plan are consistent with applicable state law.

Yours very truly,

JOHN ASHCROFT
Attorney General

February 6, 1980

OPINION LETTER NO. 73
(Answer by Letter-Klaffenbach)

The Honorable LeRoy Braungardt
Representative, District 49
Room 102B, State Capitol
Jefferson City, Missouri 65101



Dear Mr. Braungardt:

This letter is in response to your request for an opinion asking whether the Lincoln County Ambulance District is to share election costs with the County of Lincoln.

Section 115.065, RSMo, as amended by Senate Bill No. 275, 80th General Assembly, provides, with some exceptions, for the sharing of election costs under certain circumstances by political subdivisions or special districts. "Special district" is defined in § 115.013(25), RSMo, as amended by Senate Bill No. 275, 80th General Assembly, to mean any school district, water district, fire protection district or other district formed under the laws of Missouri to provide limited, specific services.

Under the Ambulance District Law, §§ 190.005, et seq., RSMo, ambulance districts are designated, under § 190.010, RSMo, as bodies corporate and political subdivisions of the state, with the authority to sue and be sued and to levy and collect taxes within certain limitations. It therefore seems clear that an ambulance district is a "special district" under the election laws and that, in the proper circumstances, the ambulance district must share in election costs.

Very truly yours,

JOHN ASHCROFT
Attorney General

July 14, 1980

OPINION LETTER NO. 74
(Answer by Letter-Klaffenbach)

The Honorable John E. Scott
Senator, 3rd District
Room 419A, Capitol Building
Jefferson City, Missouri 65101

FILED

74

Dear Senator Scott:

This letter is in response to your request for an opinion of this office asking:

Since the approval of Proposition #2,
the question is:

Can the administration of the affairs
of the Ports be taken away from the
Highway Department and placed under the
administration of the Commerce and In-
dustrial Development Department by stat-
ute or does it require a constitutional
amendment?

We understand your question to essentially ask whether the Division of Commerce and Industrial Development of the Department of Consumer Affairs, Regulation and Licensing, can constitutionally be substituted by legislation for the "Transportation Commission" as that term is used in Chapter 68, RSMo.

Under § 68.010, RSMo, the approval of the Transportation Commission is necessary for the authorization to certain cities or counties to form a local port authority. Under § 68.015, RSMo Supp. 1979, the approval of the Transportation Commission is necessary to establish or alter the boundaries of the port districts. Under subsection 2 of § 68.025, RSMo Supp. 1979, the approval of the Transportation Commission is necessary with respect to the extended direct operation of port facilities by a local port authority. Under § 68.035, RSMo Supp. 1979, the state appropriations to the state port fund are to be allocated by the Department of Transportation to local port authorities or regional port coordinating agencies.

The Honorable John E. Scott

Article IV, § 29, of the Missouri Constitution, as amended in 1979, provides in pertinent part:

The highway and transportation commission shall have authority over all state transportation programs and facilities as provided by law, including, but not limited to bridges, highways, aviation, railroads, mass transportation, ports, and waterborne commerce,

Further, § 30(c) of Art. IV of the Missouri Constitution, as amended in 1979, provides in pertinent part:

The highways and transportation commission shall have authority to locate, relocate, establish, acquire, construct, maintain, control, and as provided by law to operate, develop or fund public facilities as part of any state transportation program such as but not limited to aviation, mass transportation, railroads, ports, and waterborne commerce,

It is clear, of course, that the recent constitutional amendments to Art. IV, with respect to the Department and Commission of Highways and Transportation, abolished the Department of Transportation and the Transportation Commission and transferred the duties of that Department and Commission to the Department and Commission of Highways and Transportation. It also seems clear, and it is our view, that the Department and Commission of Highways and Transportation, under the above-quoted constitutional provisions, is the only Department or Commission which can constitutionally implement the duties of the former Department and Commission of Transportation under Chapter 68 with respect to port authorities.

Therefore, we conclude that the duties of the Department and Commission of Highways and Transportation, as provided in Chapter 68, RSMo, as amended, cannot be placed in the Division of Commerce and Industrial Development by statute because of the provisions of §§ 29 and 30(c) of Art. IV of the Missouri Constitution.

Very truly yours,

JOHN ASHCROFT
Attorney General

SCHOOLS:

SCHOOL TRANSPORTATION:

A. A board of education may provide transportation to and from school for pupils who live less than three and one-half miles from school if the parents agree in writing to pay the actual cost of transporting the pupils.

B. A board of education may not lease the school buses purchased from school district funds to a PTA council for the purpose of transporting pupils who live less than three and one-half miles from school if the parents agree in writing to pay the actual cost of transporting the pupils.

November 19, 1980

OPINION NO. 75

Dr. Arthur L. Mallory, Commissioner
Department of Elementary and
Secondary Education
6th Floor, Jefferson State Office Bldg.
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on the following two questions:

May a board of education provide transportation to and from school for pupils who live less than three and one-half miles from school at parents' expense?

May a board of education lease school buses purchased from district funds to a PTA Council for the purpose of transporting pupils who live less than three and one-half miles from school with the expense being borne by participating parents?

I.

Section 167.231, RSMo Supp. 1979, provides as follows:

1. Within all school district except metropolitan districts the board of education shall provide transportation to and from school

Dr. Arthur L. Mallory

for all pupils living more than three and one-half miles from school and may provide transportation for all pupils. State aid for transportation shall be paid as provided in section 163.161, RSMo, only on the basis of the cost of pupil transportation for those pupils living one mile or more from school. The board of education may provide transportation for pupils living less than one mile from school at the expense of the district and may prescribe reasonable rules and regulations as to eligibility of pupils for transportation. If no increase in the tax levy of the school district is required to provide transportation for pupils living less than one mile from the school, the board may transport said pupils. If an increase in the tax levy of the school district is required to provide transportation for pupils living less than one mile from school, the board shall submit the question at a public election. If a two-thirds majority of the voters voting on the question at the election are in favor of providing the transportation, the board shall arrange and provide therefor.

* * *

3. The board of education of any school district may provide transportation to and from school for any public school pupil not otherwise eligible for transportation under the provisions of state law, and may prescribe reasonable rules and regulations as to eligibility for transportation, if the parents or guardian of the pupil agree in writing to pay the actual cost of transporting the pupil (Emphasis added.)

The general rule concerning transportation of pupils is expressed in 79 C.J.S. Schools and School Districts § 475b(3).

In the absence of statute a school district owes no duty to transport pupils to and from schools, and any duty it may have is purely statutory and is limited by the terms of the statute.

Dr. Arthur L. Mallory

Under some statutes the duty to transport pupils living more than a stated distance from school is mandatory. While such statutes should be liberally construed to effectuate the legislative intent, they should be reasonably construed so that, without unnecessary burden to the district, all children entitled thereto may be furnished transportation as nearly complete as is reasonably possible. Under such statutes no discretion is conferred on the school board to expand the statutory delegation of power

There are no Missouri cases interpreting § 167.231 as enacted in 1979 with regard to providing transportation at the parents' expense, so we must look to the terms of the statute to ascertain the intent of the legislature by giving the language thereof its plain and ordinary meaning. State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d (Mo. 1974).

It is clear from subsection 3 of § 167.231 that the legislature intended that a board of education of a school district could provide transportation to pupils at the parents' expense if the pupil was not otherwise eligible for transportation under the provisions of state law. Therefore, the question becomes what students are not otherwise eligible for transportation.

The term "eligible" within the meaning of § 167.231 has not been defined by the courts. However, courts have defined the term "eligible" as the term is used in other statutory provisions. In Golden v. Industrial Commission, Division of Employment Security, 524 S.W.2d 34 (Mo.App., Spr.D. 1975), the court held the term "eligible" in a denial of unemployment benefits case included a student claimant who places his availability for work ahead of his pursuit for formal learning. In State ex rel. McAllister v. Dunn, 277 Mo. 38, 209 S.W. 110 (banc 1919), the Supreme Court held that a provision of a statute that "no sheriff, clerk or collector, or the deputy of either, shall be eligible to the office of treasurer" made a deputy collector incapable of being lawfully chosen as treasurer. In light of these two decisions, the term "eligible" implies that the applicant has fulfilled a precedent condition.

In § 167.231, a school district must provide transportation to those students living more than three and one-half miles from the school, and may also provide transportation for all students.

Dr. Arthur L. Mallory

Therefore, pursuant to the first sentence of § 167.231, those students living more than three and one-half miles from school have fulfilled the condition precedent and are eligible for free public transportation.

Further, in § 167.231, however, the board in its discretion may take action to provide transportation for students living less than three and one-half miles from school. However, with respect to students living less than one mile from school, the board may only provide transportation if such transportation may be provided without increasing the tax levy or a favorable election in favor of such transportation is passed by two-thirds of the voters. These provisions do not unconditionally grant transportation to pupils and therefore such pupils are not otherwise eligible.

Based upon the foregoing, at minimum, pupils living more than three and one-half miles from school are eligible for transportation and therefore are exempt from paying the actual cost of transportation. In the case of pupils living less than three and one-half miles from school, at the discretion of the board, transportation may be provided. However, in the case of pupils living less than one mile from school, the district may only provide transportation if no increase in the tax levy is required or two-thirds majority of the voters voting at an election are in favor of providing the transportation.

If transportation is not provided for pursuant to subsection 1 of § 167.231, then the provision of subsection 3 takes effect. In the case of pupils living less than three and one-half miles from school, if the board does not provide transportation, that transportation may be provided at the parents' expense. The board of education may provide transportation for students not otherwise eligible if the parent or guardian of the pupil agree to pay the actual cost of transportation in writing.

II.

Your second inquiry is whether the board of education can lease school buses purchased from district funds to a PTA council for the purpose of transporting pupils who live less than three and one-half miles from school with the expense being borne by the participating parents.

There is no statutory direction to the board of education either in § 167.231 or elsewhere setting forth the manner in which transportation is to be provided. However, having been granted

Dr. Arthur L. Mallory

the authority to provide transportation under certain circumstances, the board has power to purchase school buses in order to carry out this grant. McClure Brothers v. School District of Tipton, 79 Mo. App. 80, 86 (K.C. 1899). Furthermore, having been granted the authority to provide free transportation under certain circumstances, the board also has implied power to enter into contracts to provide for transportation of students. However, there is no statute authorizing a school district to lease its school buses purchased with public funds to a private individual or corporation for furnishing school transportation. In the absence of such an authorizing statute, no such power exists. 78 C.J.S. Schools and School Districts § 99a(1). Therefore, the board of education has no authority to lease school buses purchased from district funds to a PTA council to provide transportation.

CONCLUSION

It is the opinion of this office that:

A. A board of education may provide transportation to and from school for pupils who live less than three and one-half miles from school if the parents agree in writing to pay the actual cost of transporting the pupils.

B. A board of education may not lease the school buses purchased from school district funds to a PTA council for the purpose of transporting pupils who live less than three and one-half miles from school if the parents agree in writing to pay the actual cost of transporting the pupils.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leslie Ann Schneider.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

65101

March 14, 1980

OPINION LETTER NO. 76

The Honorable Dale K. Miller
Prosecuting Attorney
Andrew County
121 South Fifth Street
Savannah, Missouri 64485

Dear Mr. Miller:

This letter is in response to your request for an opinion asking whether or not a plea of guilty in person or in writing constitutes a "confession" as referred to in § 57.290.1, as amended by House Bill No. 148, 80th General Assembly, which provides for a \$2.00 sheriff's fee for every trial in a criminal case or confession. The written plea to which you refer is that provided for in uniform traffic ticket cases pursuant to Supreme Court Rule 37.1162. You also stated in a telephone conversation that the sheriff is actually present in court when the written pleas under Rule 37.1162 are submitted to the court.

We enclose four previous opinions issued by this office, listed below, which are self-explanatory. As can be seen, it has been the view of this office that a plea of guilty is the same as a "confession" so that if the sheriff is officially present in court at the time the defendant enters a plea of guilty, the \$2.00 fee would be chargeable. It is also clear from these opinions that if the sheriff is not present in court, such a fee cannot be charged.

Further, it is our view that the fee should be charged for a written plea of guilty, pursuant to a uniform traffic ticket signed by the prosecutor, which is taken by the court

The Honorable Dale K. Miller

when the sheriff is officially present. This fee is collected on behalf of the county. \$ 57.410, RSMo.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Enclosures

Att'y Gen. Op. No. 35,
Grossenheider, 4/21/55
Att'y Gen. Op. No. 24,
Downs, 2/18/52
Att'y Gen. Op. No. 99,
Wright, 1/3/51
Att'y Gen. Op. No. 39,
Herren, 8/13/47

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

March 19, 1980

OPINION LETTER NO. 77

(Answer by Letter - Lowry)

Dr. Arthur L. Mallory
Commissioner
Department of Elementary and
Secondary Education
6th Floor, Jefferson State
Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This opinion letter is in response to your request for our review and certification of your proposed "Method of Administration" (MOA) of the regulations promulgated by the Office for Civil Rights pertaining to vocational education.

Our review has taken into consideration your MOA, the guidelines promulgated by the Office for Civil Rights (Federal Register, Vol. 44, No. 56--March 21, 1979), and §§ 178.420, et seq., RSMo 1978. On the basis of this review, it is the opinion of this office that:

1. The State Board of Education is the state agency empowered to develop and carry out the necessary plans, policies, and procedures of vocational education, including this MOA; and
2. The provisions of the MOA are in accord with state and federal law.

Yours very truly,

JOHN ASHCROFT
Attorney General

GAMBLING:
CRIMINAL LAW:
LAS VEGAS NIGHT:

A "Las Vegas Night"
held by a not-for-
profit corporation
constitutes gambling
in violation
of the provisions of
Chapter 572, RSMo
1978; and that the

corporation and its officers may be found in violation of
§§ 572.030 or 572.040, RSMo 1978, which prohibit the promotion
of gambling.

December 31, 1980

Opinion No. 78

Honorable James A. Broshot
Prosecuting Attorney
Caldwell County
P. O. Box 82
Kingston, MO 64650



Dear Mr. Broshot:

This opinion is in response to your request for a
ruling on the following question:

Does a 'Las Vegas Night' held by a not-
for-profit corporation for the purpose
of raising funds for civic purposes constitute
gambling and thus violate the provisions of
Chapter 572, RSMo, 1978; and, if so, may the
corporation and/or its officers be found
in violation of § 572.030, and/or 572.040,
RSMo 1978, relating to promotion of gambling?

You stated in your opinion request the following facts:

A civic organization wishes to hold a
"Las Vegas Night" in order to raise funds for
use in the community. A "Las Vegas Night"
is an affair where people play various games
of chance (craps, roulette, twenty-one, bingo,
etc.) wagering and winning play money on the
outcome. Each person pays an entrance fee at
the door and receives a quantity of play money
to use, additional quantities of play money can
be purchased during the night. The prices are
in the range of \$10.00 for \$30,000.00 in play

Honorable James A. Broshot

money and admission and \$5.00 for an extra \$30,000.00 in play money. At the close of the night an auction is held at which time donated prizes are auctioned off to the highest bidder. Bidding and payment are in terms of the play money. If a person has won a lot of play money during the evening, he has a better chance to gain a prize than one who hasn't.

Section 572.010(4), RSMo 1978, defines gambling as follows:

[A] person engages in 'gambling' when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

Chapter 572, RSMo, does not state any exceptions or exclusions from its provisions. The fact that the gambling event described in your opinion request is designed to raise money for the community or for charity does not exempt the players or organizers from the provisions of Chapter 572. Furthermore, it is no defense that the promoters or players believe that the gambling activity is lawful. See People v. Berk, 373 N.Y.S. 201, 83 Misc.2d 711 (1975) which affirmed the conviction of two promoters of a "Las Vegas Night" for promoting gambling in the second degree and possession of a gambling device.

An examination of your description of a "Las Vegas Night" indicates that a participant pays or risks an amount of money with the expectation that at the end of the night he can, if he is lucky, redeem his play money for an item of value. Thus, your description fits the definition of gambling as defined above. See State v. One Jack Jill Pinball Machine, 224 S.W.2d 854, 860 (Mo.App., Spr.D. 1949), which states that gambling has three necessary elements: (1) consideration or risk, (2) chance and (3) reward or prize.

The answer to your second question regarding whether the corporation or its officers can be found in violation of §§ 572.030 or 572.040, RSMo 1978, depends primarily upon the circumstances of the gambling operation.

Honorable James A. Broshot

Section 572.030, RSMo 1978, states:

A person commits the crime of promoting gambling in the first degree if he knowingly advances or profits from unlawful gambling or lottery activity by:

(1) Setting up and operating a gambling device to the extent that more than one hundred dollars of money is gambled upon or by means of the device in any one day, or setting up and operating any slot machine; or

(2) Engaging in bookmaking to the extent that he receives or accepts in any one day more than one bet and a total of more than one hundred dollars in bets; or

(3) Receiving in connection with a lottery or policy or enterprise:

(a) Money or written records from a person other than a player whose chances or plays are represented by such money or records; or

(b) More than one hundred dollars in any one day of money played in the scheme or enterprise; or

(c) Something of value played in the scheme or enterprise with a fair market value exceeding one hundred dollars in any one day.

2. Promoting gambling in the first degree is a class D felony.

Section 572.040. RSMo 1978, states:

1. A person commits the crime of promoting gambling in the second degree if he knowingly advances or profits from unlawful gambling or lottery activity.

2. Promoting gambling in the second degree is a class A misdemeanor.

Honorable James A. Broshot

Section 572.040, is aimed at the small scale promoter who commits the crime by knowingly advancing or profiting from gambling or lottery activity. Thus, the two methods of promotion proscribed by statute are advancing gambling and profiting from gambling. Guilt requires a showing that the defendant knew to a substantial certainty that his activities would advance unlawful gambling or that he would profit from unlawful gambling. The first, advancing gambling, is defined in § 572.010(1), RSMo 1978. One does not advance gambling by merely acting as a player, but if one goes beyond the actions of a player and intentionally aids the gambling activity in some other way, he will be subject to punishment under § 572.030 or § 572.040. The second method, profiting from gambling, is defined in § 572.010(10) as receiving money or property, other than as a player, as proceeds from unlawful gambling based upon an agreement to that effect. A person may profit from gambling activity without advancing that activity. Any person not in the pure "player" category who voluntarily provides what he knows will be material aid in the creation or operating of a gambling scheme or who allows property owned, possessed, or controlled by him to be used for gambling or who receives gambling proceeds by a virtue of an understanding to that effect may be guilty of promoting gambling in the second degree.

If certain aggravating factors are added, second degree promotion of gambling is raised to first degree promotion of gambling under § 572.030. Again the initial act required is advancing or profiting from gambling. It is apparent that the aim of the first degree offense is to reach those who exploit the urge to gamble on a more significant scale. For this reason, the statute (in all but one instance) sets a minimum dollar amount which must be gambled before a person can be guilty of first degree promotion of gambling by committing one of the aggravating factors described in the statute.

The requirement that the defendant advance or profit from gambling in the specified ways and amounts distinguishes first degree from second degree promotion of gambling. Another distinction exists with regard to the penalty. Second degree promotion of gambling provides a misdemeanor penalty while promoting gambling in a first degree provides a felony penalty.

Under the provisions of § 562.056.1 RSMo 1978, a corporation is guilty of an offense if:

- (2) The conduct constituting the offense is engaged in by an agent of the corporation while

Honorable James A. Broshot

acting within the scope of his employment and in behalf of the corporation, and the offense is a misdemeanor or an infraction, or the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on a corporation; or

(3) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

Since a violation of § 572.030 is a class D felony offense a corporation can only be found in violation if the facts support a claim under subparagraph (3) of Subsection 1 of § 562.056 which requires knowledge and toleration of the illegal activity on the part of the board of directors or a high managerial agent acting within the scope of his employment and in behalf of the corporation.

Any officer of a corporation who promotes an illegal gambling operation could be liable under either § 572.030 or 572.040 because pursuant to the provisions of § 562.061 an officer or agent of a corporation is "...criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation...as if such conduct were performed in his own name or behalf."

CONCLUSION

Therefore, it is the opinion of this office a "Las Vegas Night" held by a not-for-profit corporation constitutes gambling in violation of the provisions of Chapter 572, RSMo 1978; and that the corporation and its officers may be found in violation of §§ 572.030 or 572.040, RSMo 1978, which prohibit the promotion of gambling.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jerry Short.

Very truly yours,



JOHN ASHCROFT
Attorney General

February 8, 1980

OPINION LETTER NO. 79
(Answer by Letter-Burns)

The Honorable John C. Andrews
Prosecuting Attorney
Worth County
Post Office Box D
Grant City, Missouri 64456



Dear Mr. Andrews:

This is in answer to your opinion request asking whether the county clerk of a third class county is required to charge a \$3.00 fee for sealing or filing of documents relating to campaign disclosure laws.

We enclose Opinion No. 182, rendered October 16, 1979, and Opinion No. 183, rendered November 20, 1979, both opinions being issued to James C. Kirkpatrick.

I believe that these opinions will answer the question contained in your opinion request.

Very truly yours,

JOHN ASHCROFT
Attorney General

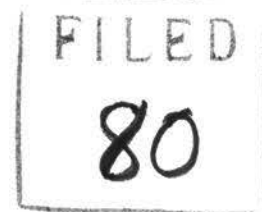
Enclosures

Att'y Gen. Op. No. 182,
Kirkpatrick, 10/16/79
Att'y Gen. Op. No. 183,
Kirkpatrick, 11/20/79

March 25, 1980

OPINION LETTER NO. 80
(Answer by Letter-Klaffenbach)

The Honorable Gary G. Sprick
Prosecuting Attorney
Howard County
Courthouse
Fayette, Missouri 65248



Dear Mr. Sprick:

This letter is in response to your question asking as follows:

Can the Board of Trustees of a county hospital organized under the provisions of Section 205.160, et seq, buy a clinic facility with public funds and pursuant to Section 70.210, et seq, enter into a contractual arrangement with the Department of Family Practice of the University of Missouri School of Medicine to operate the clinic and divide the revenue therefrom (as is set forth in the statement of facts attached hereto)?

In the statement of facts that you have submitted to us, you further state:

Keller Memorial Hospital, Fayette, Missouri, is a public hospital organized under the provisions of Section 205.160, et seq, RSMo. The Hospital Board of Trustees would like to purchase an existing medical clinic near the hospital which is presently owned by two private physicians who intend to retire from practice. The purchase of the clinic would be made with public funds controlled by the Hospital Board of Trustees. The Department

The Honorable Gary G. Sprick

of Family Practice at the University of Missouri School of Medicine wishes to establish a clinic training program for their resident physicians in Fayette, Missouri. If the Hospital Board of Trustees purchases the clinic facility, the Department of Family Practice would like to operate the facility as an outpatient clinic staffed by three physicians who are full time salaried faculty members of the University School of Medicine and by resident physicians in the Family Practice Training Program. All physicians employed at the clinic would be paid by salary from the University of Missouri School of Medicine. The Department of Family Practice and the Board of Hospital Trustees would enter into a contractual arrangement whereby the clinic facility would be leased from the Hospital Board of Trustees by the Department of Family Practice and the revenues generated by the operation of the clinic would be allocated and used as follows:

- (1) To pay the direct expenses of operating the clinic;
- (2) To pay the retirement of indebtedness incurred by the Hospital Board of Trustees in purchasing the clinic, or, to pay a fair lease rental to the hospital trustees in consideration of its purchase of the clinic;
- (3) To reimburse the University of Missouri for the salaries of the faculty physicians working at the clinic;
- (4) To set up a reserve for contingencies for the clinic facility

The Honorable Gary G. Sprick

including repair, maintenance,
renovation, and purchase of new
equipment.

- (5) The balance of the operating
revenue would be paid to the
University of Missouri Depart-
ment of Family Practice.

Our examination of the provisions of the cooperative agree-
ment statutes, §§ 70.210, et seq., RSMo, leads us to the conclu-
sion that such an agreement could not be entered into. Under
§ 70.220, it is required that the subject and purposes of any
contract or cooperative action made and entered into by a politi-
cal subdivision shall be within the scope of the powers of the
political subdivision. We know of no authority for a county
hospital organized under the provisions of §§ 205.160, et seq.,
RSMo, to provide for the operation of a clinic as contemplated.

Very truly yours,

JOHN ASHCROFT
Attorney General

July 21, 1980

OPINION LETTER NO. 81
(Answered by Letter-Wieler)

The Honorable Gary C. Lentz
Prosecuting Attorney of
Newton County
Newton County Courthouse
Neosho, Missouri 64850



Dear Mr. Lentz:

This letter is written in response to your request for an opinion on the following question:

What is the manner provided by law under Chapter 230 for abolishing the alternative county highway commission and returning to the county highway commission?

Section 230.210, RSMo 1978, provides a means whereby the voters of a county can adopt the alternative county highway commission provided by §§ 230.200 to 230.260. Basically, this section provides that the county court shall submit the question of the adoption of the alternative county highway commission to a vote of the voters of the county at the next general election upon the filing of a petition calling for the same in the office of the clerk of the county court equalling five (5%) percent of the vote cast for governor in the last general election.

Section 230.205.1, RSMo 1978, provides that all counties of the state which have adopted the alternative county highway commission may abolish it by submitting the question to a vote of the voters of the county "in the manner provided by law." However, a review of the statutes fails to disclose any general means by which the voters of a county can be given an opportunity to vote

The Honorable Gary C. Lentz

on the abolishment of a county commission or agency. Therefore, it is necessary to construe the language of this section in order to accomplish the obvious intention of the legislature that the voters of the county be given an opportunity to abolish the alternative county highway commission if they so desire.

The Missouri Supreme Court has said that it is proper to consider the history of legislation, the surrounding circumstances, and the ends to be accomplished in construing ambiguous words in a statute. See for example, State ex rel. Zoological Park, Sub-district of City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975); State v. Wright, 515 S.W.2d 421 (Mo. banc 1974); and Mashak v. Poelker, 367 S.W.2d 625 (Mo. banc 1963). In view of the legislature's stated intention that voters be allowed an opportunity to vote on the question of abolishing the alternative county highway commission, it is our opinion that the phrase "in the manner provided by law" means in the manner provided by law for establishing such a commission. In other words, upon the filing of a petition in the office of the clerk of the county court by voters equal to five (5%) percent of the vote cast for governor in the last general election requesting the abolition of the alternative county highway commission, the county court shall, by order of the record, submit the question to a vote of the voters of the county at the next general election. The question would be submitted in substantially the following form:

Shall the alternative county highway
commission be abolished in _____
County?

Very truly yours,



JOHN ASHCROFT
Attorney General

TAXATION: With respect to the provisions of subsection 2
ASSESSMENT: of § 137.750, RSMo Supp. 1979, relating to costs
of reassessment, that the terms "taxing jurisdiction" and "taxing authority" have essentially the same meaning; in calculating the percentage of reassessment costs, the county collector should include in the formula all ad valorem real and personal property tax collections, including distributable property taxes; if the county collector undercharges a taxing jurisdiction in estimating the costs of reassessment for a particular year, it is proper for him to make a deduction to recover the undercharge in future tax years; and he is to pay the taxing authority what it has due because of overcharges, as provided in such subsection.

May 21, 1980

OPINION NO. 82

The Honorable Joe Moseley
Prosecuting Attorney
2nd Fl., Boone County Courthouse
8th and Walnut
Columbia, Missouri 65201

Dear Mr. Moseley:

This opinion is in response to your question asking for an interpretation of § 137.750, RSMo Supp. 1979. Specifically, you ask, and we paraphrase your question:

- (1) What is the meaning of the terms "taxing jurisdiction" and "taxing authority" as used in subsection 2 (3) of § 137.750?
- (2) In calculating the percentage of reassessment costs the county shall pay, what classes of property should the county collector include in the formula provided in subsection 2 (3) of § 137.750?
- (3) If the county collector in estimating the charges of reassessment for a particular year overcharges or undercharges a taxing jurisdiction what remedies are available to the parties?

Subsection 2 of § 137.750 provides in pertinent part:

2. A county ordered to perform a general reassessment by the Commission or a court shall be reimbursed for all reasonable costs

The Honorable Joe Moseley

expended pursuant to a general reassessment plan approved by the Commission in the manner hereinafter set forth.

. . .

(3) An additional twenty-five percent from all taxing jurisdictions within the county, including the county but not the state, for reasonable costs actually incurred pursuant to an approved plan which are incurred for the expenses specified in subdivision (4) of this subsection. The amount to be paid by each taxing jurisdiction shall be on the percentage basis that the tax proceeds received by such taxing jurisdiction for the preceding year bears to the total tax proceeds received by all such taxing jurisdictions within the county during that same preceding year. The county collector shall estimate the costs which will be incurred pursuant to the approved plan for the following year and which are allocable to local taxing jurisdiction. A percentage of all ad valorem property tax collections allocable to each taxing authority, except the state, based on the percentage basis determined as provided in this subdivision shall be deducted by the collector from the collections of taxes due on December thirty-first of that year. The collector shall bill any taxing authority collecting its own taxes for that taxing authority's proportionate share of the costs incurred pursuant to the approved plan. Such taxing authority shall pay its proportionate share out of such funds as the governing body of that taxing authority may designate. Funds so deducted or paid shall be deposited in the fund provided for in subsection 7. Any amount which is attributable to deductions under this subdivision remaining in the fund each year after payment of all costs shall be paid to the taxing authorities from which it was derived on the same percentage basis as it was deducted originally;

. . .

The Honorable Joe Moseley

In answer to your first question, it is our view that the terms "taxing jurisdiction" and "taxing authority, as used in subsection 2 have essentially the same meaning. Under § 11 (a) of Art. X of the Missouri Constitution, taxes may be levied by counties and other political subdivisions on all property subject to their taxing power. And, under § 15 of Art. X of the Missouri Constitution, the term "other political subdivision," as used in the constitutional article governing taxation is to be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax.

In answer to your question asking what classes of property the county collector shall include in the formula provided in subsection 2 in calculating the percentage of reassessment costs, it is our view that the deduction is to be made from all ad valorem property tax collections (including distributable property taxes) allocable to each taxing authority and no distinction is made in the subsection between real or personal property. See § 1.020 (11), RSMo, which provides that the word "property" includes real and personal property.

Your last question asks what remedies are available if the county collector in estimating the costs of reassessment for a particular year overcharges or undercharges a taxing jurisdiction.

In the case of a taxing jurisdiction being overcharged, subsection 2 of § 137.750 provides that any amount which is attributable to deductions under that subsection remaining in the fund each year after payment of all costs shall be paid to the taxing authorities from which it was derived on the same percentage basis as it was deducted originally.

Insofar as undercharges are concerned, your question is more difficult. It can be argued that since the legislature has not prescribed a procedure for recovery by the county with respect to undercharges that no such recovery may be had. It is our view, however, that the entire purpose of these provisions was to set up an equitable system for paying for reassessment costs. The legislature has provided precisely how the parties will bear the costs and having so provided, it seems clear that the collector has the right to make up for any undercharge by adding such amounts in calculating future deductions.

The Honorable Joe Moseley

That the legislature must have intended this result seems all the more obvious when it is considered that the legislature has authorized the collector to bill any taxing authority collecting its own taxes for that taxing authority's proportionate share of the costs incurred pursuant to the approved plan. Thus, we believe that the county has a legally enforceable right to receive each taxing authority's appropriate share of the costs incurred pursuant to the approved plan. Accordingly, if voluntary payment is not made by the undercharged taxing authority, it is proper in this situation for the collector to make up for the undercharges by making deductions from future taxes collected for the undercharged taxing authority.

CONCLUSION

It is the opinion of this office with respect to the provisions of subsection 2 of § 137.750, RSMo Supp. 1979, relating to costs of reassessment, that the terms "taxing jurisdiction" and "taxing authority" have essentially the same meaning; in calculating the percentage of reassessment costs, the county collector should include in the formula all ad valorem real and personal property tax collections, including distributable property taxes; if the county collector undercharges a taxing jurisdiction in estimating the costs of reassessment for a particular year, it is proper for him to make a deduction to recover the undercharge in future tax years, and he is to pay the taxing authority what it has due because of overcharges, as provided in such subsection.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

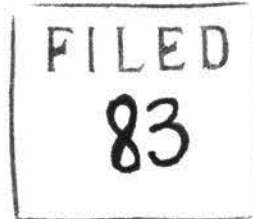
A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

March 5, 1980

OPINION LETTER NO. 83
(Answer by letter-Lowry)

Dr. Arthur L. Mallory
Commissioner
Department of Elementary and
Secondary Education
P. O. Box 480
Jefferson City, Missouri 65102



Dear Dr. Mallory:

In accordance with your request of February 6, 1980, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Application for Federal Assistance--Migrant Education Program" (fiscal year 1981). This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended. See 20 U.S.C. § 241c-2.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto, our review has taken into consideration Art. III, § 38(a), Mo. Constitution (1945), and § 161.092, RSMo 1978.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of P.L. 89-10 (20 U.S.C. § 244), including those arising from the assurances set forth in the application.

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Yours very truly,

JOHN ASHCROFT
Attorney General

February 26, 1980

OPINION LETTER NO. 84
(Answer by Letter-Klaffenbach)

The Honorable Richard M. Webster
Senator, 32nd District
Senate Post Office
Jefferson City, Missouri 65101



Dear Senator Webster:

This letter is in response to your question asking whether a city library established pursuant to the provisions of §§ 182.140, RSMo, et seq., should have a board of trustees of nine or ten members. You state that by tradition the city of Pierce City, Missouri, has had a tenth member on the board of trustees of the municipally-operated library board of trustees. You also state that the tenth member was not selected by the mayor nor approved by the city council but apparently is an elected president of the local parent-teachers association.

Section 182.170, RSMo, provides:

When any city establishes and maintains a public library under sections 182.140 to 182.301, the mayor or other proper official of the city, with the approval of the legislative branch of the city government, shall proceed to appoint a library board of nine trustees, chosen from the citizens at large, with reference to their fitness for the office. No member of the city government shall be a member of the board.

It is clear that this section sets out the procedure for the appointment of the members of the board of trustees, as well as the number of such trustees. It is also clear

The Honorable Richard M. Webster

that where the legislature has authorized a municipality to exercise a power and prescribes the manner of its exercise, the municipality is denied the right to exercise the power given in any other manner. Pearson v. City of Washington, 439 S.W.2d 756 (Mo. 1969). See also § 71.010, RSMo.

Therefore, it appears that your question is answered by the provisions of § 182.170, which provides the method of appointment and also provides that the library board will consist of nine trustees.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 5, 1980

OPINION LETTER NO. 85

The Honorable John E. Scott
State Senator
419A Capitol Building
Jefferson City, Missouri

Dear Senator Scott:

This letter is written in response to your request for an opinion concerning the meaning of § 87.207, RSMo 1978, dealing with cost of living increases under the firemen's retirement and relief system. Specifically, you asked the following question:

Does the intent of the law and meaning of the words and language in this statute mean that the three percent cost of living benefit be compounded yearly, or is this benefit tied to the basic pension allowance only?

In pertinent part, § 87.207, RSMo 1978, provides as follows:

The retirement allowance due under the provisions of sections 87.120 to 87.370 of any member who retired from service with a retirement service allowance, ordinary disability allowance or accidental disability allowance shall be increased annually at a rate not to exceed three percent as approved by the board of trustees beginning with the first increase in the second October following his retirement and subsequent increases in each October thereafter; . . .

The Honorable John E. Scott

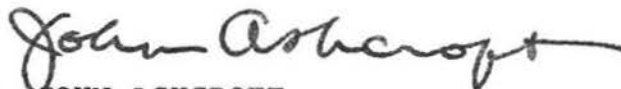
Subsequent provisions of the statute provide for decreases or adjustment in accordance with the consumer price index as published by the United States Department of Labor. The term "retirement allowance" as used above is defined in § 87.120(15), RSMo 1978, as "annual payments for life which shall be payable in equal monthly installments or any benefits in lieu thereof granted to a member upon retirement or to a beneficiary."

When the definition of the term "retirement allowance" is considered in conjunction with § 87.207, RSMo 1978, it is apparent that the amount of money in question must be related to a specific date, that is, the date of each individual member's retirement. It is the base pension allowance due upon retirement which is subject to increase or decrease in accordance with the terms of the statute. The limitations contained in § 87.207 can be observed by applying the three percent cost of living benefit to the base pension only rather than the base pension plus annual cost of living raises already granted. Another sentence of § 87.207 provides:

If the increase is in excess of the approved rate for any year, the excess shall be accumulated as to any retired member and increases may be granted in subsequent years subject to a maximum of three percent for each full year from October following his retirement but not to exceed a total increase of twenty-five percent.

These limitations could not be applied without reference to the basic pension allowance computed for each member upon retirement. Therefore, it is our opinion that the annual cost of living increase as approved by the board of trustees pursuant to Chapter 87 must be computed against each member's basic pension allowance only. Prior increases cannot be compounded with the basic pension so as to enlarge the retirement allowance from which the annual cost of living increase is computed.

Very truly yours,



JOHN ASHCROFT
Attorney General

SECRETARY OF STATE:
NOT FOR PROFIT CORPORATIONS:

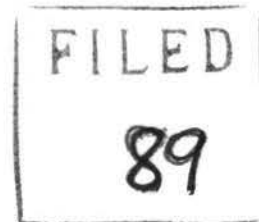
A Chapter 355 corporation
may be merged into a Chapter
352 corporation, in the manner
provided in Section 352.150.

Once a judicial determination of lawfulness of the merger between two
such corporations has been made, the secretary of state must file the
facially valid documents presented to him as required by law.

October 24, 1980

OPINION NO. 89

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is issued in response to your request for an
official opinion on the following questions:

Can Chapter 355 not for profit corpora-
tions be merged into a Chapter 352 benevo-
lent corporation, with the Chapter 352
corporation as the survivor? If so, is it
sufficient to follow the procedures of Sec-
tions 352.140-352.170? If not, may the
corporations still be merged by an alter-
native method, and what would be the impact
of a judicial decision declaring them merged?

In considering the questions posed, we should first consider
the respective purposes for which Chapter 355 and Chapter 352
corporations are formed.

Section 355.025 provides as follows:

Not for profit corporations may be
organized under this chapter for any one or
more of the following or similar purposes:
charitable; benevolent; eleemosynary; educa-
tional; civil; patriotic; political; religious;
cultural; social welfare; health; cemetery;
social; literary; athletic; scientific; re-
search; agricultural; horticultural; soil,
crop, livestock and poultry improvement; pro-
fessional, commercial, industrial, or trade

The Honorable James C. Kirkpatrick

association; wildlife conservation; homeowner and community improvement association; recreational club or association; and for the ownership and operation of water supply facilities for drinking and general uses; or for the purpose of executing any trust, or administering any community chest, fund or foundation, to further objects which are within the purview of this section.

The language of Section 352.020 is strikingly similar:

Any association formed for benevolent purposes, including any purely charitable society, hospital, asylum, house of refuge, reformatory and eleemosynary institution, fraternal-beneficial associations, or any association whose object is to promote temperance or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public, may become a body corporate and politic under this chapter; any association, congregation, society or church organization formed for religious purposes, and any association formed to provide or maintain a cemetery; any school, college, institute, academy or other association formed for educational or scientific purposes, including therein any association formed specially to promote literature, history, science, information or skill among the learned professions, intellectual culture in any branch or department, or the establishing of a museum, library, art gallery, or the erection of a public monument, and in general, any association, society, company or organization which tends to the public advantage in relation to any or several of the objects above enumerated, and whenever is incident to such objects, may be created a body corporate and politic by complying with sections 352.010 and 352.060.

The comparison of the above two sections clearly illustrates that both chapters may, within their respective purviews, govern corporations which are of the same nature, e.g., charitable, benevolent, eleemosynary, educational, scientific or religious.

The Honorable James C. Kirkpatrick

The answer to your first and second questions, therefore, seems to be contained within the language of Section 352.140 which reads as follows:

Any corporation or corporations heretofore or hereafter organized under the laws of this state relating to the incorporation of benevolent, religious, scientific, fraternal-benevolent, educational and miscellaneous associations may be merged in any other such corporation or may be consolidated with any other such corporation or corporations to form a consolidated corporation under such laws, on compliance with the provisions of sections 352.140 to 352.170.
(Emphasis added.)

The plain language of that section fails to limit its availability to a corporation organized under any particular provision of law. Rather, the legislature has restricted its use to certain similar types of organizations. The general rule to be followed in such cases is that the merger proposed and the statute in question should be construed broadly, not narrowly or technically, having due regard to the object intended to be accomplished. 19 C.J.S. Corporations, § 1606. We conclude, therefore, that the merger of a Chapter 355 corporation into a Chapter 352 corporation is not barred by statute and may, in fact, be accomplished in the manner set forth in Section 352.140.

With respect to your third question, our research has disclosed no alternative method whereby the corporations in question may be merged.

Regarding the effect of a judicial decision declaring two corporations merged, we are of the opinion that a final judgment of a court with jurisdiction to consider the question of the lawfulness of the merger would be binding upon the secretary of state. Specifically, once the circuit court has issued its order under Section 352.150.2 upon a finding that the "merger or consolidation is not inconsistent with the constitution or laws of the United States or of this state," the secretary of state is not then able to question the validity of the merger and must therefore file the court's order as directed in Section 352.150.4. We view the issuance of the certified copy of the merger agreement and order of the court as a ministerial function, once the required judicial determination has been made and the documents are facially valid. See in this regard our Opinion No. 457 issued to you on October 24, 1969, and Opinion No. 20, issued to your predecessor on July 13, 1960.

The Honorable James C. Kirkpatrick

CONCLUSION

It is therefore the opinion of this office that a Chapter 355 corporation may be merged into a Chapter 352 corporation, in the manner provided in Section 352.150. Once a judicial determination of lawfulness of the merger between two such corporations has been made, the secretary of state must file the facially valid documents presented to him as required by law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Christopher M. Lambrecht.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

MISSOURI STATE EMPLOYEES'
RETIREMENT SYSTEM:

It is the opinion of this office
with respect to the question con-
cerning a loan of funds of the

Missouri State Employees' Retirement System to the Chrysler Corpor-
ation to be secured by land in the state of Michigan that: 1. Sec-
tion 379.080 RSMo authorizes a loan by the Retirement System secured
by improved unencumbered real estate worth at least two times the
amount of the loan; 2. Section 376.300 RSMo, Senate Bill 322,
80th General Assembly authorizes a loan by the Retirement System
not exceeding one percent of the system's assets and not more than
75% of the fair market value of the unencumbered real estate;
3. The prudent man rule is applicable to the Board of Trustees of
the Retirement System acting under either of the above sections.

OPINION No. 92

March 7, 1980

Mrs. Jane Bierdeman-Fike
Chairperson
Missouri State Employees'
Retirement System
1801 Dawson Place
Fulton, Missouri 65251



Dear Mrs. Fike:

This is to acknowledge receipt of your request for a
formal opinion from this office which reads as follows:

Advice is requested as to whether or
not the Missouri State Employees' Retirement
System has authority to make a loan to the
Chrysler Corporation in the amount of twenty-
five million dollars (\$25,000,000.00) and
receive as security for the investment, a
first mortgage lien on the land, buildings,
and equipment known as the Chrysler Chelsea
Proving Grounds located in Chelsea, Michigan.

In your opinion request, you have attached a letter dated
February 7, 1980 along with documents and data concerning the
Chrysler Chelsea Proving Grounds. It is our understanding
that this letter is the formal proposal of the Chrysler Corpor-
ation concerning the loan. This letter reads in part as follows:

Mrs. Jane Bierdeman-Fike

Chrysler Corporation wishes to borrow a total of \$25 million from the Missouri State Employees Pension Fund, the other Missouri State's Pension Funds, the City of St. Louis Pension Funds, the County of St. Louis Pension Funds or any combination thereof. The security for the Pension Funds' investment would be a first mortgage lien on the land, buildings, and equipment known as the Chrysler Chelsea Proving Grounds located in Chelsea, Michigan.

It is proposed that the loan bear the then current mortgage market interest rate for property of this nature at the time the loan is made, that the loan be for a period of fifteen years, that interest only be paid until January 1, 1984, that the entire principal of the loan together with interest be amortized over the remaining term of the loan beginning January 1, 1984 and that Chrysler Corporation have the option to repay the loan without penalty at any time. It is further proposed that the loan shall be made only after the following conditions are met:

1. An appraisal of the Proving Grounds by an appraiser selected by you and paid for by Chrysler Corporation shall show a fair market value for the Proving Grounds of at least \$33.34 million in order to meet the loan ratios required for investments under the Missouri pension laws.

2. Assurances have been received from the Loan Guarantee Board under the Chrysler Corporation Loan Guarantee Act of 1979 that the loan qualifies as nonfederally guaranteed assistance from a State government for purposes of the Act.

3. Waivers to obtain the loan have been received from existing Chrysler Corporation lenders where required.

4. Adequate assurances have been received from the Federal Government that any Federal interest is fully subordinated to Missouri's claim.

Mrs. Jane Bierdeman-Fike

5. Necessary legal documentation for the loan acceptable to all parties to the transaction will have been agreed upon.

Although the formal Chrysler proposal appears to indicate that a first mortgage lien on the land, buildings and equipment will be given as security for the proposed loan, it is our understanding that the primary issue for consideration is whether or not the Retirement System can make a loan to the Chrysler Corporation in the amount of twenty-five million dollars (\$25,000,000.00) and receive as security for the investment a first mortgage lien on the land and buildings known as the Chrysler Chelsea Proving Grounds located in Chelsea, Michigan. Therefore, at this time, we will only consider the authority of the Retirement Board to make a loan secured by a first mortgage on the land and buildings.

I.

DISCUSSION OF FEDERAL LEGISLATION

P.L. 96-185, which is cited as the Chrysler Corporation Loan Guarantee Act of 1979 (hereinafter referred to as the Act), was signed into law by the President of the United States on January 17, 1980. Subsection 9 of Section 2 of the Act defines the term "persons with an existing economic stake in the health of the Corporation" to include state, local and other governments. Section 3 of the Act established the Chrysler Corporation Loan Guarantee Board (hereinafter referred to as Board) which is responsible for the administration of the Act. The Board has authority under the provisions of Section 8(c) of the Act to extend government loan guarantees for the Chrysler Corporation in an amount not to exceed \$1,500,000,000.00. However, Section 4(a) of the Act provides that the Board may make such commitments only if at the time the commitment is issued, the Board determines that:

(1) There exists an energy-savings plan that is satisfactory to the board and can be carried out by the company.

(2) The borrowed funds are needed to enable the company to continue production, and the failure to secure such funds would adversely affect the economy or employment in any region of the country.

(3) The corporation has submitted a satisfactory operating plan for fiscal 1980 and the next three fiscal years demonstrating its ability to continue operations.

Mrs. Jane Bierdeman-Fike

(4) The corporation has submitted a satisfactory financing plan to meet its operating needs that includes at least \$1,430,000,000 of nonfederally guaranteed assistance from: parties with an existing economic stake in the company; the merger or the sale of assets or securities; and the issuance of \$100,000,000 in common stock for sale to its employees.

(5) The board has received adequate assurances that all components of the financing plan will be available and that such financing is adequate.

(6) The corporation's creditors waive their rights to recover under any prior credit commitment which may be in default unless the board determines that the exercise of those rights would not adversely affect the operating plan.

(7) No credit issued before Oct. 17, 1979, be converted to a guaranteed loan. (Summary taken from Congressional Quarterly Weekly Report Vol. 38 No. 3, p. 137 - 138, January 19, 1980.)

In addition Section 4(b)(1) of the Act reads in part as follows:

For the purpose of computing the aggregate amount of at least \$1,430,000,000 in nonfederally guaranteed assistance required to be provided under subsection (a)(4):

(A) the term "financial commitment" means a legally binding commitment to provide additional nonfederally guaranteed assistance to meet the financing needs of the Corporation in excess of any such commitments outstanding as of October 17, 1979;

(B) the term "concession" means a legally binding commitment (or in the case of a concession from a State, local, or other government, a concession for which the Board has received adequate assurances) which will result in a reduction in the financing needs of the Corporation by an amount which is more than the amount of any reduction accomplished by any concessions outstanding as of October 17, 1979, and, except for a loan or other credit, shall be nonrecoupable; . . .

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Further, Section 4(c) of the Act provides that the \$1.43 billion in non-federally guaranteed assistance shall include:

(1) At least \$500,000,000 from domestic banks, financial institutions and other creditors, of which at least \$400,000,000 shall be new loans or credits and \$100,000,000 shall be concessions on outstanding debt.

(2) At least \$150,000,000 from foreign banks, financial institutions and other creditors in the form of new loans or credits.

(3) At least \$300,000,000 from the sale of corporate assets.

(4) At least \$250,000,000 from state, local and other governments.

(5) At least \$180,000,000 from suppliers, and dealers, of which at least \$50,000,000 shall be in the form of capital.

(6) At least \$50,000,000 from the sale of additional issues of stock. (Summary taken from Congressional Quarterly Weekly Report Vol. 38 No. 3, p. 137 - 138, January 19, 1980.)

It should also be specifically noted that under Section 4(c) of the Act the Board may, as necessary, modify the amounts of assistance required to be provided by any of the categories referred to above, so long as the aggregate amount of at least \$1,430,000,000 in non-federally guaranteed assistance is provided under Section 4(a)(4).

Section 11 of the Act refers to the protection of the interest of the federal government. In this regard, Section 11(f) of the Act provides that the Board may bring an action in any United States District Court or any other appropriate court to enforce compliance with the provisions of the Act or any agreement related thereto. Section 11(i)(1) of the Act relates to the priority of the federal government as to the assets of the Chrysler Corporation in case of default and reads as follows:

(i)(1) Notwithstanding any other provision of law and subject to paragraphs (2), (3), and (4) whenever any person is indebted to the United States as a result of any loan guarantee issued under this Act and such person is insolvent or

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is a debtor in a case under title 11 United States Code, the debts due to the United States shall be satisfied first.

(2) Subject to paragraphs (3) and (4), the Board may waive the priority established in paragraph (1) if:

(A) the Board determines that the waiver of such priority is necessary to facilitate the ability of the Corporation, or any borrower to obtain financing; and

(B) the Board determines that, despite such waiver, there is a reasonable prospect of repayment of the loans guaranteed under this Act.

(3) Subject to paragraph (4), waivers under paragraph (2) may only be issued:

(A) with respect to any State or local government;

(B) with respect to a supplier of the Corporation, except that no supplier of the Corporation may receive waivers under paragraph (2) with respect to claims of such supplier in an amount of more than \$100,000; and

(C) with respect to loans made after October 17, 1979 by any creditor of the Corporation up to a total of \$400,000,000.

(4) A waiver under paragraph (2) with respect to a supplier of the Corporation or any creditor of the Corporation under paragraph (3) (C) may not by its terms subordinate the claims of the United States under this Act to those of any other creditor of the Corporation or of any borrower.

Thus, under the above provisions, the Federal Government will have full priority as a creditor with respect to certain loans to the Chrysler Corporation. However, it can waive priority with respect to claims of any state or local government.

A serious question can be raised as to whether the retirement system is a "state or local government" for purposes of obtaining

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a waiver of the federal government's priority. At the writing of this opinion we cannot give assurances that such a waiver would be authorized for the retirement system under the federal legislation. Certainly, prior to the extension of any loan to Chrysler, it would be necessary for the retirement system to be assured by the federal government that a waiver had been granted.

As a result of the foregoing summary of the federal legislation, it is our view that any loan made to the Chrysler Corporation by the Missouri State Employees' Retirement System would be authorized only if the federal government waives its priority as to assets of the Chrysler Corporation in the event of its default.

II

DISCUSSION OF STATE EMPLOYEES' RETIREMENT SYSTEM

The Missouri State Employees' Retirement System, as now provided for in Chapter 104 of the Revised Statutes of Missouri, came into formal existence on September 1, 1957 under an act of the Sixty-ninth Missouri General Assembly, for the purpose of providing retirement allowances and other benefits for employees and public officials of the State of Missouri. Laws of Missouri 1957, pages 706, 707. Section 104.320 RSMo 1978 provides that the Missouri State Employees Retirement System shall be a body corporate and an instrumentality of the state in the department of revenue. Under the provisions of Section 104.450 RSMo 1978, the Retirement System is governed by a board of trustees consisting of the state treasurer, the commissioner of administration, the director of the personnel division, one member of the senate appointed by the president pro tem of the senate, one member of the house of representatives appointed by the speaker of the house, two members of the system who are appointed by the governor, and two members of the system who are elected by the members themselves. The statutory provision relating to the funds of the Retirement System and their investment, are found in subsections 1 and 3 of Section 104.440 RSMo 1978 and read as follows:

1. The board shall set up and maintain a Missouri state employees' retirement and benefit fund account in which shall be placed all payroll deductions, deferred compensation, payments, and income for all sources. All property, money, funds, investments, and

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rights which shall belong to, or be available for expenditure or use by, the system shall be dedicated to and held in trust for the members and for the purposes herein set out and no other. The board shall have power, in the name and on behalf of the system, to purchase, acquire, hold, invest, lend, lease, sell, assign, transfer, and dispose of all property, rights, and securities, and enter into written contracts, all as may be necessary or proper to carry out the purposes of sections 104.310 to 104.550.

3. So far as practicable, the funds and property of the system shall be kept safely invested so as to earn a reasonable return. The board may invest the funds of the system as permitted by laws of Missouri relating to the investment of the capital, reserve, and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri.

Thus, under the above statutory provisions, all property, money, funds, investments, and rights which shall belong to or be available for expenditure or use by, the system shall be dedicated to and held in trust for the members and for the purposes set out in Chapter 104 and no other. The board of trustees has authority to make investments and so far as practicable, the funds and property of the system shall be kept safely invested so as to earn a reasonable return. The board may invest the funds of the system as permitted by the laws of Missouri relating to the investment of the capital, reserve, and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri. As a result, we now consider the statutory provisions relating to investments by insurance companies.

III

DISCUSSION OF SECTION 379.080 RSMo 1978

As we have previously suggested, the board of trustees of the Missouri State Employees' Retirement System may invest the funds of the system as permitted by the laws of Missouri relating to the investment of the capital, reserve, and surplus funds of casualty insurance companies organized under the laws of Missouri.

Mrs. Jane Bierdeman-Fike

Insurance companies other than life, or "casualty insurance companies" are defined by Section 378.010 RSMo 1978. The investment of capital and other funds of casualty insurance companies is set forth in Section 379.080 RSMo 1978. In this connection, subsection 1 of Section 379.080 RSMo 1978 provides in part as follows:

1. No company formed on the joint stock plan for the purpose of doing any of the kinds or classes of business mentioned in subdivision (1), (2), or (3) of section 379.010, shall hereafter commence business with a capital of less than four hundred thousand dollars and a surplus of at least four hundred thousand dollars, except plate glass insurance companies and accident insurance companies, which may be permitted to do business with a capital of one hundred thousand dollars and a surplus of at least one hundred thousand dollars; and before any such company shall proceed to do business, the capital of that company shall be wholly paid in, and two hundred thousand dollars thereof, if a plate glass insurance or accident insurance company, and eight hundred thousand dollars thereof, if any other company mentioned in said section 379.010, be held in cash or invested in treasury notes or bonds of the United States, or in bonds of the state of Missouri, or in bonds issued by any school district of the state of Missouri, or in funded bonds of any county or municipal township of this state, or in bonds and mortgages or deeds of trust on improved unencumbered real estate in this or any other state worth at least double the amount loaned thereon, the valuation of the real estate so mortgaged to be determined by the director after a personal examination, or after an examination made by some competent disinterested person specially appointed by him for that purpose; such bonds shall not be received at a rate above their actual market value; and the remainder of the capital of these companies and their other assets may be invested either in the property or securities in this section above mentioned, or in loans safely secured by collateral worth, at its cash market value, not less than twenty percent in excess of the amount loaned thereon

Mrs. Jane Bierdeman-Fink

or in stocks, bonds or evidences of indebtedness issued by corporations organized under the laws of this state, or of the United States, or of any other state, or, so far as may be necessary to make deposits with the authorities of foreign countries to do business therein, the bonds of such foreign countries; . . . (Emphasis added)

It must be borne in mind that in interpreting the provisions of § 379.080, above quoted, we are called upon to determine that section's application to investments made by the Board of Trustees of the Missouri State Employees' Retirement System. As so interpreted it is our view that the portion of that section which we have underscored which requires security of at least double the amount loaned on improved unencumbered real estate is the applicable provision and that it was not the legislative intent that retirement funds be invested with any less security. It may be arguable that under other provisions above quoted the collateral need only be not less than twenty percent (20%) in excess of that amount loaned thereon. Adoption of that view, would by definition provide the retirement system funds with less security than is required for the combined capital and investment of casualty insurance companies. As a result, it is our view as legal advisor to the Board of Trustees that the requirement of double the amount loaned is the applicable requirement.

Therefore, insofar as authorized investments under § 379.080.1 are concerned, the mortgage or deed of trust on unencumbered real estate must be at least double the amount loaned and no less.

Section 379.080 does not expressly limit the amount to be loaned except as it relates to the security for the loan. However, it is also clear that in determining the amount to be loaned under this section, the Board of Trustees would be held to a prudent standard of investment. We will discuss this aspect later.

Section 379.080 also refers to a valuation of the property and requires that it be determined by the Director of the Division of Insurance after the Director's personal examination or after an examination made by some competent disinterested person specially appointed by him for that purpose. We take this requirement to mean that if the Board reaches a point wherein an appraisal is thought to be desirable, the Board should communicate its desire to the Director of the Division of Insurance in order to satisfy the letter of the law. The Board must satisfy itself that a proper appraisal is made. In other words, for purposes

Mrs. Jane Bierdeman-Fike

of the loan decision, the appraisal of the land is fundamentally and inherently the responsibility of the Board of Trustees. As a consequence, if the Board of Trustees considers making such a loan, it must see that an appraisal of the value of the land is made which reflects the actual worth of the land, i.e. what it would readily bring on the market in the event Chrysler went into bankruptcy.

IV

DISCUSSION OF SECTION 376.300 RSMo 1978 AS AMENDED BY SENATE BILL NO. 322 FIRST REGULAR SESSION 80th GENERAL ASSEMBLY

The investment of the capital, reserve, and surplus funds of life insurance companies organized under the laws of the State of Missouri is set forth in § 376.300 and other statutory provisions which are not relevant to your inquiry. Subsection 1 of § 376.300 provides as follows:

1. All other laws to the contrary notwithstanding, the capital, reserve and surplus of all life insurance companies of whatever kind and character organized under the laws of this state shall be invested only in the following: . . .

Subdivision 9 of subsection 1 of Section 376.300 relating to certain real estate loans, reads as follows:

(9) Loans evidenced by notes or other evidences of indebtedness and secured by first mortgage liens on unencumbered real estate or unencumbered leaseholds having at least twenty-five years of unexpired term, such real estate or leaseholds to be located in the United States, any territory or possession of the United States. Such loans shall not exceed seventy-five percent of the fair market value of the security of the loan, except that any life insurance company may sell any real estate acquired by it and take back a purchase money mortgage or deed of trust for the whole or any part of the sale price; and such percentage may be exceeded if and to the extent such excess is guaranteed or insured by the United States, any state, territory or possession of the United States, any city within the United States having a

Mrs. Jane Bierdeman-Fike

population of one hundred thousand or more or by an administration, agency, authority, or instrumentality of any such governmental units; and said percentage shall not exceed one hundred percent if such a loan is made to a corporation which qualifies under subdivision (5) for investment in its bonds, notes or other evidences of indebtedness, or if the borrower assigns to the lender a lease or leases on said real estate providing rentals payable to the borrower in amounts sufficient to repay such loan with interest in the manner specified by the note or notes evidencing such loan and executed as lessee or lessees by a corporation or corporations, which qualifies under subdivision (5) for investment in its or their bonds, notes or other evidences of indebtedness. No mortgage loan upon a leasehold shall be made or acquired pursuant to this subdivision unless the terms of the mortgage loan shall provide for amortization payments to be made by the borrower on the principal thereof at least once in each year in amounts sufficient to completely amortize the loan within four-fifths of the term of the leasehold which is unexpired at the time the loan is made, but in no event exceeding thirty years. Real estate or a leasehold shall not be deemed to be encumbered by reason of the existence in relation thereto of

(a) Liens inferior to the lien securing the loan made by the life insurance company;

(b) Taxes or assessment liens not delinquent;

(c) Instruments creating or reserving mineral, oil or timber rights, rights-of-way common or joint driveways, easements for sewers, walls or utilities;

(d) Building restrictions and other restrictive covenants; or

(e) An unassigned lease reserving rents or profits to the owner.

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On the other hand, subsection 2 of Section 376.300 provides as follows:

2. No such life insurance company shall invest in any of the foregoing securities in excess of the following percentages of the admitted assets of such company, as shown by its last annual statement preceding the date of acquisition, as filed with the director of the insurance division of the state of Missouri:

Thereafter, subdivision (2) of subsection 2 of Section 376.300 reads as follows:

(2) One percent of its admitted assets or ten percent of its capital and surplus, whichever is greater, in any single loan on real estate under subdivision (9) of subsection 1;

It is our view that subparagraph 2(2) of § 376.300 cannot be applied to the investment of funds of the Retirement System in the same manner that it would be applied to such insurance companies. The Retirement System does not have capital and surplus although it does certainly have assets. An insurance company which comes under this section would have the benefit of investments made pursuant to both the one percent and ten percent requirements of such subsection. However it seems clear that the legislature in Section 376.300, which provides for loans not exceeding 75% of the fair market value of the security for the loan did not intend that the Retirement System be permitted to make investments on the basis of ten percent of its assets. Therefore, the system must be held to the restriction to one percent of its assets. We reach this conclusion because to do otherwise would give these provisions an interpretation which would allow the Board of Trustees to assume a risk which would be greater than the risk that the legislature has allowed such insurance companies under the same statute. In our view the ten percent limitation is not applicable and the one percent limitation, must be applied in determining the amount of the loan which the Retirement System may make under § 376.300.

Therefore, the Retirement Board has authority to make loans secured by unencumbered real estate in an amount not exceeding 75% of the fair market value of the real estate and not exceeding 1% of the assets of the retirement system.

V

DISCUSSION OF PRUDENT MAN RULE

We have previously pointed out earlier in our discussion that under the provisions of subsection 1 of Section 104.440 RSMo all property, money, funds, investments, and rights which shall belong to or be available for expenditure or use by the system shall be dedicated to and held in trust for the members of the Retirement System and for the purposes set out in Chapter 104 and no other. Further, under the provisions of subsection 3 of Section 104.440 RSMo 1978, the board of trustees has authority to make investments and so far as practicable, the funds and property of the system shall be kept safely invested so as to earn a reasonable return. In this regard, it was pointed out in Attorney General Opinion No. 176 Bode, 7-12-67 that the purpose of subsection 3 of Section 104.440 RSMo is to prescribe investments authorized for the Missouri State Employees Retirement System and that the fiduciary duties of the board of trustees of the retirement system are of a higher order than the duties of the board of directors of an insurance company.

For a fundamental statement of the high standards governing those who invest trust funds we direct your attention to the case of Rand et al. v. McKittrick, 142 S.W.2d 29, where the Court referred to the Restatement of the Law, on Trusts, and stated at page 31 as follows:

As to the duty of a trustee in making investments, see sec. 227, page 645, of the same book, where we find the rule as follows:

"In making investments of trust funds the trustee is under a duty to the beneficiary

"(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived."

This latter statement is the yardstick generally used by the courts of the union in determining the duties of a trustee. Courts following the New York rule, as well as those

following the Massachusetts rule, are in perfect harmony on this question. It is also the rule in this state. See *Cornet v. Cornet* 269 Mo. 298, 190 S.W. 333, loc. cit. 339(5).

[1, 2] An analysis of these cases will disclose that the courts of the land have required trustees of trust funds to exercise a greater degree of care and caution when investing such funds than prudent men ordinarily exercise when investing their own funds. Investments which are speculative in nature have been universally tabooed, by the courts of the union, as proper investments for trust funds. Yet prudent men may and do invest in speculative enterprises. *Wild v. Brown* 120 N.J.Eq. 31, 183 A. 899. Hence the rule is well stated, Restatement of the Law, on Trusts, supra, that trustees may "make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived." The part we have italicized is important. If that rule is adhered to, does it become necessary, or is it expedient or advisable for a court to arbitrarily declare any particular class of securities as unfit for trust investments? We think not. . . . We think this demonstrates that the preservation of trust estates depends more upon the integrity, honesty and business acumen of the trustees than it does upon arbitrary legal classification of securities wherein trust funds may be invested. Changed economic conditions often play havoc with the best laid plans. For example, a favorite investment, that is, first mortgage security on farm lands and other real estate, due to a changed economic condition, was the cause of many banks closing their doors in recent years. . . . (Emphasis in original)

The Court then quoted with approval from the case of *Walker v. Buhl*, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569, as follows:

Mrs. Jane Bierdeman-Fike

"When such a fund passes into the hands of a trustee, it becomes impressed with a double duty: First, to so invest it that it can be turned over at the expiration of the trust period without loss; and, second, to secure an income therefrom. He must act honestly and faithfully, and in what he believes to be the best interest of the cestui que trust. He must exercise a sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters employ in their own affairs when making a permanent investment, in which the primary object is the preservation of the fund and the secondary one that of obtaining an income therefrom. He must not permit himself to take the hazard of an investment with the hope of largely increasing the fund as he might, perhaps, do in the prudent management of his own estate. The entire element of speculation must be removed. He must at all times remember that he is handling a trust fund, the care of which has been intrusted to him in reliance on his integrity, fidelity and sound business judgment."

Also, in the case of Vest v. Bialson, 293 S.W.2d 369 (Mo. 1956), the Supreme Court of Missouri held that although the finding of the trial court that the trustee had not been guilty of dishonesty or bad faith would be accepted, nevertheless the trustee's sale of corporate stock and the reinvestment of the proceeds in real estate thereby making the entire investment of the trust in real estate was such that he would be surcharged for a loss in connection therewith.

The Court pointed out in making investments of trust funds that the trustee must consider first the safety of the investment and second the diversification of the investment in order to minimize the risk of loss. In addition, in discussing the discretion of the trustee, the court made the following comments on page 380:

. . . As stated in comment i under Sec. 187, "Although discretion is conferred upon the trustee as to the choice of investments, he cannot properly invest in hazardous securities." Likewise as said in comment v, Sec. 277, "An

Mrs. Jane Bierdeman-Fike

authorization by the terms of the trust to invest in a particular type of security does not mean that any investment in securities of that type is proper. The trustee must use care and skill and caution in making the selection. * * * Where by the terms of the trust discretion is conferred upon the trustee to make certain investments, he is subject to liability if he abuses the discretion (see Sec. 187). Thus, if the trustee is permitted to invest in a particular security in his discretion and the circumstances are such that it would be beyond the bounds of a reasonable judgment to make the investment, the trustee is subject to liability if he makes it." Furthermore, a trustee is in a fiduciary relation to the beneficiary and "is under the duty to the beneficiary to administer the trust solely in the interest of the beneficiary." (Emphasis ours.) Restatement of Trusts, Sec. 170. This is the primary duty of any trustee and must be the principle guide to be considered in the construction of any powers given him by the trust instrument and the propriety of his acts under them. "He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." Scott on Trusts, Sec. 170.

Therefore, in addition to the specific statutory restrictions on the proposed Chrysler loan, we conclude that the members of the Board of Trustees of the Missouri State Employees' Retirement System, in administering and investing the funds of the system are bound by the general law respecting trusts and trustees.

We wish to emphasize that although the statutes may authorize a particular kind of investment, and may even specify a level of security it may well be that such an investment does not conform to the prudent man rule as detailed in the foregoing cases.

For example, we note that in Withers v. Teacher Retirement System, et al., 447 F. Supp 1248 (S.D. N.Y. 1978), beneficiaries of the New York City Teacher Retirement System brought an action against the trustees of the retirement system seeking damages and injunctive relief prohibiting further investment of pension assets in securities and obligations of the City of New York. The court stated in part, at page 1254:

Mrs. Jane Bierdeman-Fike

. . . The statutory authorization to invest in a security of a particular class, however, does not relieve the trustee of the obligation to exercise prudence in respect to each individual investment. Delafield v. Barret, 270 N.Y. 43, 200 N.E. 67, 69 (N.Y. Ct. of Appeals 1936). . . .

The court in Withers supra, further indicated that had the city's potential bankruptcy not been a factor, the decision of the trustees to commit so large a portion of the assets of the retirement system to the purchase of the New York City bonds would have violated traditional notions of prudence as developed by the New York Court of Appeals. There, of course, the survival of the retirement system of the City of New York was intricately interwoven with the financial condition of the city.

We note that on September 2, 1974 the Employee Retirement Income Security Act of 1974, commonly known as ERISA became effective. In general, governmental plans are excluded from its provisions relating to reporting, disclosure, fiduciary and investment standards. However, final regulations have been published by the Department of Labor which is responsible for the administration of ERISA with respect to the investment of plan assets under the "prudent man rule". The Board of Trustees may wish to give some consideration to those standards, as a guide to common and generally accepted concepts of the prudent man rule which we have heretofore discussed. See C.F.R. § 2550, 404A-1.

VI

FEDERAL BANKRUPTCY CONSIDERATIONS

In discussing the legislative history of the Chrysler Corporation Loan Guarantee Act of 1979, the following statement was made in the United States House of Representatives' Committee on Banking, Finance and Urban Affairs in House Report 96-690, 1980 U.S. Cong. Adm. News, Vol. 11a, 96 Cong. 1st sess. at p. 4995:

A crucial element in your Committee's decision to approve loan guarantees for Chrysler involved a judgment as to the company's chances of succeeding in the marketplace following a period of bridging assistance from the Federal Government. While the Committee examined various detailed forecasts, including those of the Treasury and outside analysts such

Mrs. Jane Bierdeman-Fike

as Booz, Allen & Hamilton, there can be no clear-cut answer to this question of judgment. Chrysler's prospects will depend critically upon two variables that cannot be precisely forecast -- the overall volume of United States automobile and truck sales in the years immediately ahead, and Chrysler's market penetration.

Given these uncertainties, your Committee shares the judgment of Secretary of the Treasury Miller that "there can be no assurance of success with this or any other plan". It would be irresponsible to promise unequivocally that Chrysler, with this help, will "make it" in the future.

However, your Committee also shares Secretary Miller's conclusion that "the financing approach is sound and the underlying business plan can remedy Chrysler's weaknesses." The market and other assumptions, on which the estimated need for external assistance of \$3 billion is based, are conservative. The testimony indicated nearly universal approval of the company's future product plans, including a massive switch toward smaller and more fuel-efficient cars. In these circumstances, it would be equally irresponsible to deny assistance on the basis of "worst case" assumptions when there are reasonable prospects for success.

As a result of the above, it is submitted that one of the considerations by the Board of Trustees in making a proposed loan to the Chrysler Corporation is the possibility that the company will be placed in federal bankruptcy or reorganization proceedings. In this regard, the following comment was made as to the rights of a mortgagee in bankruptcy under the previous Bankruptcy Act in G. Osborne, G. Nelson, & Whitman, Real Estate Finance Law (Rev. Ed 1979) at 554:

In theory, mortgagees should be unconcerned when insolvency forces mortgagors to file bankruptcy. Indeed, protection from such occurrences is the very reason for creation of mortgage security interests.

Mrs. Jane Bierdeman-Fike

In reality, however, mortgagees' rights, contractual and statutory, are often substantially affected by federal bankruptcy law, as many learn when they are forced into bankruptcy court to defend their security interests from the trustee's attack. Familiar state laws, requiring minimal time and effort to foreclose, are often neutralized by federal bankruptcy provisions which may freeze property for years. . . .

It should be noted that Congress has repealed the previous bankruptcy law and replaced it with a totally new bankruptcy code which became effective on October 1, 1979. While much of the substantive law and bankruptcy concepts under the old act will continue to be applicable under the new act, it is our understanding that the new act does make numerous significant changes in existing law and practice.

Therefore, this opinion should not be construed in any sense as a guarantee or unqualified prediction of the result of any bankruptcy litigation. Litigation and potential litigation is inherently a risky undertaking and for that reason the possibility always exists that contrary to expectation, a particular claim will or will not be successful.

VII

DISCUSSION OF NECESSITY OF WAIVERS BY CERTAIN CREDITORS

It has come to our attention that loans have been made to the Chrysler Corporation by banking and other corporations with agreements prohibiting the creation of secured debt by Chrysler in excess of specified amounts. If a loan is to be made to Chrysler by the State Employees' Retirement System secured by the Chelsea Proving Grounds, waivers would have to be secured from all such persons having claims against Chrysler so as to protect the Retirement System.

CONCLUSION

It is the opinion of this office with respect to the question concerning a loan of funds of the Missouri State Employees' Retirement System to the Chrysler Corporation to be secured by land in the state of Michigan that:

Mrs. Jane Bierdeman-Fike

1. Section 379.080 RSMo authorizes a loan by the Retirement System secured by improved unencumbered real estate worth at least two times the amount of the loan;

2. Section 376.300 RSMo, Senate Bill 322, 80th General Assembly authorizes a loan by the Retirement System not exceeding one percent of the system's assets and not more than 75% of the fair market value of the unencumbered real estate;

3. The prudent man rule is applicable to the Board of Trustees of the Retirement System acting under either of the above sections.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

BAIL:
SCHOOLS:

A school district is a political subdivision within the meaning of the Missouri Supreme Court Rule 33.17 and, under the provisions of such rule, a local school board member cannot be accepted as a surety on a bail bond.

June 30, 1980

Ronald D. White
Prosecuting Attorney
Phelps County Courthouse
Rolla, Missouri 65401

OPINION NO. 95

Dear Mr. White:

This opinion is issued in response to your request in which you ask the following questions:

1. Is a member of a local school board prevented from being accepted as a surety on a bail bond by reason of membership?
2. Is the School Board of the Rolla Public School System's School District a political subdivision within the meaning of Missouri Supreme Court Rule 32.14(4)?

Under Supreme Court Rule 33.17, previously Rule 32.14(4), no person is to be accepted as a surety on any bail bond taken under the Supreme Court Rules if he is an elected or appointed official or employee of the State of Missouri or of any county or of any other political subdivision thereof. The terms of Rule 33.17 are clear and unequivocal. If a person is an official or employee of a political subdivision, he cannot be accepted as surety on a bail bond. The rule provides no exceptions or limitations on the meaning of the term "political subdivision." Thus, it is evident that, in the event a school district is defined as a political subdivision, then no official or employee of the school district can serve as a surety on a bail bond.

Ronald D. White

The term "political subdivision" is repeatedly defined by Missouri Statutes in various chapters. A few definitions specifically exclude school districts from the meaning of the term "political subdivision." Section 70.600(19), RSMo 1978, defines, for the purpose of § 70.600 to 70.760, a political subdivision as:

" . . . any governmental subdivision of this state created pursuant to the laws of this state, and having the power to tax, except public school districts:"

The Community Affairs Act defines "political subdivision" as:

" . . . counties, townships, cities, towns, villages, whether not incorporated, special districts, excluding school districts, housing authorities, land clearance for redevelopment authorities, municipal, county, regional or other planning commissions and any other local public body created by the general assembly or exercising governmental functions." § 251.020(6) RSMo 1978.

The Missouri Constitution specifically includes school districts in its definition of "other political subdivisions" for taxing purposes:

"The term "other political subdivisions," as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax." Art. X, § 15, Mo. Constitution.

In a similar vein, the Missouri Supreme Court has held that, for purposes of entering into a concession agreement with the Kansas City Park Board, the Kansas City School District is "a political subdivision devoted to public education and is not a person, firm, or corporation" School District of Kansas City v. Kansas City, 382 S.W.2d 688, 697 (Mo. banc 1964).

Ronald D. White

Consequently, it is our view that, for the purposes of applying Supreme Court Rule 33.17, a school district is a political subdivision, and the rule is applicable to appointed or elected officials of the school district, including members of the school board. Therefore, the answer to both of the questions you have posed is in the affirmative. The Rolla Public School System's School District is a political subdivision, and a member of the school board cannot be accepted as a surety on a bail bond.

CONCLUSION

Therefore, it is the opinion of this office that a school district is a political subdivision within the meaning of Missouri Supreme Court Rule 33.17 and, under the provisions of such rule, a local school board member cannot be accepted as a surety on a bail bond.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jerry Short.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", followed by a horizontal line.

JOHN ASHCROFT
Attorney General

CRIMINAL LAW:
CRIMINAL PROCEDURE:

If a drug offender, otherwise
qualifying for expungement of
his conviction under § 195.290,
RSMo 1978, receives any disposition of his offense other than
judicial probation, he is not entitled to the expungement of
his conviction under this statute.

April 16, 1980

OPINION NO. 97

Mr. Jess L. Mueller
Lincoln County Prosecuting Attorney
409 Main Street
Troy, Missouri 63379

Dear Mr. Mueller:

This opinion is in response to your question asking the
following:

Under Section 195.290, RSMo, may a person
who has been sentenced for a drug violation
of possession of marihuana of over 35 grams
who was not placed on probation but actually
served time in the Missouri [Division] of
Corrections have his record expunged if at
the time of the sentencing, he was under the
age of 21 years old.

Section 195.290, RSMo 1978, states in pertinent part as
follows:

After a period of not less than six
months from the time that an offender was
placed on probation by a court, such person,
who at the time of the offense was twenty-
one years of age or younger, may apply to
the court which sentenced him for an order
to expunge from all official records,
except from those records maintained under
the comprehensive drug abuse prevention
and control act, as enacted in 1970, and
all recordations of his arrest, trial and
conviction. (Emphasis supplied.)

Mr. Jess L. Mueller

As stated in State v. Kraus, 530 S.W.2d 684 (Mo. banc 1975), "[t]he primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning [citations omitted]." Id. at 685. In the present case, the statute states in clear terms that a drug offender may not take advantage of this expungement provision until "[a]fter [he] . . . was placed on probation by a court." A necessary implication from this is that, if the offender is not placed on probation by the court, he is not entitled to relief under this statute. Accordingly, it must be concluded that, if a drug offender otherwise qualifying under § 195.290 receives any disposition of his offense other than judicial probation, he is not entitled to the expungement of his conviction under that statute.

CONCLUSION

It is the opinion of this office that if a drug offender, otherwise qualifying for expungement of his conviction under § 195.290, RSMo 1978, receives any disposition of his offense other than judicial probation, he is not entitled to the expungement of his conviction under this statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John M. Morris.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

65101

March 7, 1980

OPINION LETTER NO. 98

The Honorable Harriett Woods
Senator, District 13
Capitol Building, Room 329
Jefferson City, Missouri 65101

Dear Senator Woods:

This letter is in answer to your recent opinion request concerning eligibility of an individual for the office of municipal judge of the City of Wellston, Missouri, which is a city within a first class county with a charter form of government.

You state that this person was municipal judge of the City of Wellston for a period of more than three years prior to January 2, 1979. You state further that the contention has been made that the provisions of § 479.020(3), V.A.M.S., insofar as non-lawyers are concerned have the effect only of holding in office a nonlawyer municipal judge until the end of his term of office.

Section 479.020(3), V.A.M.S., provides as follows:

No person shall serve as a municipal judge of any municipality with a population of seven thousand five hundred or more or of any municipality in a county of the first class with a charter form of government unless he be licensed to practice law in this state unless, prior to January 2, 1979, of this act, he has served as municipal judge of that same municipality for at least three years.

Under the clear provisions of such section, a person who is not a lawyer and who has served at least three years as the municipal judge of a city coming within the provisions of such section is eligible to serve as municipal judge of such a city.

The Honorable Harriett Woods

There is no requirement in such section that the service as municipal judge be continuous or that the person filing for office under such subsection be an incumbent of the office at the time he files or that he file for office at the first election held after the adoption of such subsection.

Therefore, it is our view that any person who has, prior to January 2, 1979, served as a municipal judge of any municipality with a population of seven thousand five hundred or more or in any municipality in a county of the first class with a charter form of government for at least three years is eligible to file as a candidate for such office in 1980 in a city in which such judge is to be elected in 1980.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive style with a prominent "J" and a long, sweeping underline.

JOHN ASHCROFT
Attorney General

MENTAL HEALTH:

The Department of Mental Health and its facilities should deposit monetary grants, gifts, donations, devises and bequests to the credit of the Mental Health Trust Fund. State purchasing requirements relating to bids must be complied with unless it is impossible to make such purchases on a bid basis because of the provisions of the donations or bequests or if the property is of a technical nature in which case direct purchases can be authorized.

September 15, 1980

OPINION NO. 101

Paul R. Ahr, M.D., Ph.D.
Director, Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Ahr:

This opinion is rendered in response to your inquiry concerning the authority of the Department of Mental Health to deposit monetary grants, gifts, donations, devises and bequests in the State Treasury to the credit of the Mental Health Trust Fund and to suspend state purchasing requirements wherein you ask:

Should the Department of Mental Health and its facilities, on receipt of grants, gifts, donations, devises and bequests, deposit these monies in the State Treasury to the credit of the Mental Health Trust Fund or the State Institutions Gift Trust Fund?

May the Department of Mental Health and its facilities suspend state purchasing requirements when these requirements would be in conflict with the specific purpose or object of the grant, gift, donation, devise or bequest?

Your first question addresses the authority of the Department of Mental Health to deposit monetary grants, gifts, donations, devises and bequests in the State Treasury to the credit of the Mental Health Trust Fund.

Paul R. Ahr, M.D., Ph.D.

As you point out in your attachment to your request for an opinion of the Attorney General, Section 33.563, RSMo 1978, provides that:

There is hereby created in the treasury the 'State Institutions Gift Trust Fund'. Unless otherwise provided, all moneys derived from gifts, bequests or donations to or for the use of any state agency or state institution shall be deposited in the treasury to the credit of the state institutions gift trust fund and shall be appropriated for the purposes of carrying out the objects for which the gift, bequest or donation was made. (Emphasis supplied.)

Section 630.330.1, House Bill 1724, 80th General Assembly, provides specifically for the deposit of monetary grants, gifts, donations, devises or bequests in the State Treasury to the credit of the "Mental Health Trust Fund" stating:

The director may for the benefit of the department or any residential facility operated by the department take, receive, administer and hold in trust all grants, gifts, donations, devises or bequests of money or other personal property, or any real property on behalf and in the name of the governor, and the income or interest received or earned on any property or funds so acquired from any person whether individual, body politic, corporate, partnership, unincorporated association or from any other source. If any grant, gift, donation, devise or bequest is made for a specified use or purpose, it shall not be applied either wholly or in part for any other use or purpose. The director may, if so authorized by the general assembly, convey or lease any real property so acquired. The director or the governor shall deposit the funds derived from such sale or conveyance or lease and any other funds derived from grants, gifts, donations, devises or bequests of money or other property, whether real or personal or income or interest therefrom, in the state treasury where it shall be credited to a special fund known as the 'Mental Health Trust Fund,' which is hereby created. The mental health trust fund shall not lapse biennially and, accordingly, shall be exempt from the provisions of section 33.080, RSMo, relating to the transfer of funds to the general revenue fund of the state by the state treasurer.

Paul R. Ahr, M.D., Ph.D.

Thus, since "other provision" is specifically made in Section 630, 330, House Bill 1724, 80th General Assembly, facilities should deposit monetary grants, gifts, donations, devises and bequests in the State Treasury to the credit of the Mental Health Trust Fund.

Your second question addresses the authority of the Department of Mental Health to suspend state purchasing requirements. The hypothetical set of facts posed in your attachment to your request for an opinion of the Attorney General sets forth a specific product and its use to be purchased with the monetary grant, gift, donation, devise or bequest. Also posed is the possibility that a monetary grant, gift, donation, devise or bequest may be contingent upon expenditure of the money within the immediate local community. The hypotheticals posed in your attachment to your request for an opinion of the Attorney General all contemplate the purchase of personal property by the Department of Mental Health or one of its facilities; therefore, only the purchase of personal property will be discussed in this opinion.

Section 34.030, RSMo 1978, provides in part that:

The commissioner of administration shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided.

No exception applicable to purchases made with monetary grants, gifts, devises, donations or bequests to the Department of Mental Health is provided in Chapter 34.

"Supplies" is defined in Section 34.010.1, RSMo 1978, to mean "supplies, materials, equipment, contractual services and any and all things, except as in this chapter otherwise provided." "Department" is defined in Section 34.010.3, RSMo 1978, to include "department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

The Department of Mental Health and its facilities do not belong to the legislative or judicial departments and, as an agency of the state and its subdivisions, are included in the departments of the state for which the commissioner of administration shall purchase supplies.

The term "supplies" as defined in Section 34.010.0, RSMo 1978, is certainly broad enough to include purchases made with monetary grants, gifts, donations, devises or bequests.

Paul R. Ahr, M.D., Ph.D.

Therefore, purchases made pursuant to monetary grants, gifts, devises, donations or bequests to the Department of Mental Health must be made by the state purchasing agent.

It should be noted that Section 630.330, House Bill 1724, 80th General Assembly, specifically states, in part, that ". . . If any grant, gift, donation, devise or bequest is made for a specified use or purpose, it shall not be applied either wholly or in part for any other use or purpose."

Section 34.040, RSMo 1978, states in pertinent part:

All purchases shall be based on competitive bids. . . . The contract shall be let to the lowest and best bidder. The commissioner of administration shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price. All bids shall be based on standard specifications wherever such specifications have been prepared by the commissioner of administration as provided in section 34.050.

It is an accepted rule of statutory construction that statutes relating to the same class of things should be read in connection with one another as constituting one law, and they should be harmonized, if possible. Both Sections 630.330, House Bill 1724, 80th General Assembly and 34.040, RSMo 1978, relate to the purchase of items by the Department of Mental Health or one of its facilities pursuant to a monetary grant, gift, donation, devise or bequest to the Department of Mental Health or one of its facilities.

Read together, Sections 630.330, House Bill 1724, 80th General Assembly, and 34.040, RSMo 1978, require the purchases made pursuant to the monetary grants, gifts, donations, devises or bequests to the Department of Mental Health or its facilities to be made only after competitive bids based on the specifications on which the monetary grants, gifts, donations, devises or bequests were made have been taken unless it is impossible to make such purchases on a bid basis because of the provisions of the donations or bequests in which case direct purchases can be authorized. Section 34.100, RSMo 1978, provides as follows:

The commissioner of administration shall have power to authorize any department to purchase direct any supplies of a technical

Paul R. Ahr, M.D., Ph.D.

nature which in his judgment can best be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the commissioner of administration together with all bids received and prices paid.

Under such section, if the commissioner of administration in his judgment determines that the property to be purchased is of a technical nature which can best be purchased direct by the Department, he can authorize the Department to make such purchase direct.

CONCLUSION

It is the opinion of this office that the Department of Mental Health and its facilities should deposit monetary grants, gifts, donations, devises and bequests to the credit of the Mental Health Trust Fund. State purchasing requirements relating to bids must be complied with unless it is impossible to make such purchases on a bid basis because of the provisions of the donations or bequests or if the property is of a technical nature in which case direct purchases can be authorized.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hannelore Fischer.

Sincerely,

A handwritten signature in cursive script that reads "John Ashcroft".

JOHN ASHCROFT
Attorney General

April 7, 1980

OPINION LETTER NO. 102
(Answer by Letter-Klaffenbach)

The Honorable Betty C. Hearnese
Representative, 160th District
Room 102B, Capitol Building
Jefferson City, Missouri 65101



Dear Mrs. Hearnese:

This letter is in response to your question asking:

Sections 246.200 and 246.210-Do either or both of the described Sections prohibit the construction of culverts over and across ditches, drains or water courses constructed by a drainage or levee district if the culvert does not obstruct, divert or impair the flow of water.

You also state:

The County Court of Mississippi County has been advised by the Prosecuting Attorney of Mississippi County that culverts constructed over and across ditches, drains or water courses within the boundaries of the levee district in the County violate the provisions of Sections 246.200 and 246.210, and that the same Sections prohibit future construction of such culverts. Attached is a copy of a letter from the Prosecutor to the Court in which he states his opinion and intentions. The subject culverts are used by the private land owners as a

The Honorable Betty C. Hearnese

means of crossing the constructed waterways which transverse their lands. The culverts are constructed by laying a large drainage pipe in the constructed waterway and packing its top with natural materials for a road base. Water flows freely through the pipe.

Section 246.200, RSMo, to which you refer provides in pertinent part:

1. No person, corporation, county court or other municipal corporation shall be permitted to sink, set, or drive any posts, pillars or piling in any of the ditches, drains or watercourses constructed by any district organized under the laws of this state for the purpose of erecting any bridge, trestle or covering over or across any such ditch, drain or watercourse. All supports for any such bridges, coverings or trestles shall be erected or placed on the banks of such ditches, drains or watercourses so as not to obstruct the flow of the water therein.

.

Obviously a culvert does not have "posts, pillars or piling" and therefore the first sentence in the above subsection would not apply. We believe, however, that a culvert could reasonably come within the term "covering" as used in the second sentence of the subsection above-quoted with the result that the very nature of such a culvert would indicate that it could not be used in such a manner because the support of the culvert extends into the banks and the bottom of such ditches.

It is clear that when § 246.200 was first enacted, the use of culverts, as we now know them, was not common. And, it seems obvious that the legislature did not consider the probable future use of culverts in enacting that statute. Nevertheless, it is our view that such section literally prohibits such use of culverts. The question of whether or not

The Honorable Betty C. Hearnese

there should be a prosecution in any instance is, of course, a matter for the prosecuting attorney to determine.

We enclose for your information Att'y Gen. Op. No. 28, DeField, April 28, 1977, in which we concluded that the word "bridge," as used in § 242.350, RSMo, includes "culvert"; and drainage districts organized under the provisions of Chapter 242, RSMo, may utilize culverts rather than bridges where the drainage ditches of the district cross public roads.

You also refer to § 246.210, which prohibited the impairment of drainage ditches. Such section was repealed by the Laws of 1977, when the new Criminal Code was enacted, effective January 1, 1979.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 28,
DeField, 4/28/77

April 15, 1980

OPINION LETTER NO. 103
(Answer by Letter-Klaffenbach)

The Honorable Al Nilges
Representative, District 126
Room 413, Capitol Building
Jefferson City, Missouri 65101

FILED

103

Dear Mr. Nilges:

This letter is in response to your question asking:

Would a volunteer firefighter job be considered 'lucrative' if what he receives for doing this job consists of the following:

1. turnout equipment
2. uniforms
3. workmen's compensation
4. \$10 per month expense money which the firefighters have voted to return to the district for new equipment.

You also state that you ask this question because of the use of the term "lucrative" in § 321.015, RSMo, which provides:

No person holding any lucrative office or employment under this state, or any political subdivision thereof as defined in section 70.120, RSMo, shall hold the office of fire protection district director under this chapter. When any fire protection district director accepts any office or employment under this state or any political subdivision thereof, his office shall thereby be vacated and he

The Honorable Al Nilges

shall thereafter perform no duty and receive no salary or expenses as fire protection district director. This section shall not apply to members of the organized militia, of the reserve corps, public school employees and notaries public. The term 'lucrative office or employment' does not include receiving retirement benefits for service rendered to a fire protection district, the state or any political subdivision thereof. (Emphasis added)

It is our understanding that the word "lucrative" means "yielding gain or profit; profitable; bearing or yielding a revenue or salary." Black's Law Dictionary 855 (5th ed. 1979).

We do not know precisely what you refer to when you speak of "turnout equipment." We assume that such equipment is fire-fighting equipment, the title to which remains in the fire district or if it does not remain in the fire district has no other value to the volunteer firemen.

We assume that the uniforms so furnished are of use only in the performance of such duties and have no remaining value after services are terminated.

It is our view that the furnishing of workmen's compensation does not result in the employment being "lucrative" because the purpose of workmen's compensation is to compensate the employee for his loss and not to reward him for his services. Benefits provided under workmen's compensation are not reparations for injury as such, but for loss of earning power and disability from work and, in the public interest, are intended to ameliorate losses suffered by a workman and his dependents during his disability. Todd v. Goostree, 493 S.W.2d 411 (Mo. App. KCD 1973).

You have not indicated whether the \$10 expense allowance is in excess of the expenses actually incurred. We assume that the expenses are equal to or greater than the allowance. If the expenses are less than the allowance, the amount of the expense allowance over the actual expenses incurred constitutes profit or compensation and the fact that the individual donated such profit or compensation to the fire district or to a worthy cause would not change its character.

The Honorable Al Nilges

With these assumptions in mind, we do not believe that any of the items you mentioned in the four categories would constitute salary, compensation, or profit so as to make the position "lucrative."

You have not provided us with a specific fact situation, and therefore, we do not determine whether there is any common law conflict of interest.

Very truly yours,

JOHN ASHCROFT
Attorney General

July 17, 1980

OPINION LETTER NO. 105

(Answer by Letter--Wood)

Honorable Richard M. Webster
Senator, 32nd District
Room 331, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Webster:

This is in response to your request for our official legal opinion relative to the following questions:

1. Are there any provisions in state law which would prohibit payment pursuant to the Rural Health Clinic Services Act (PUB. L. 95-210) for services rendered by registered nurses in rural health clinics so long as such services are authorized by section 335.016(8), RSMo?
2. Do such services authorized by section 335.016 include making a nursing diagnosis, as distinguished from a medical diagnosis, when not under the direct or general supervision of a physician?

The Federal Social Security Act authorizes certain payments toward the costs of professional care necessitated by illness, disease or injury that is rendered to the elderly (Title XVIII, Medicare) or to the indigent (Title XIX, Medicaid). Included in such care are "services" that may be delivered in a "rural health clinic." According to the federal law, a rural health clinic must meet, among other requirements, the following one:

[I]n the case of a facility which is not a physician-directed clinic, [it must have] an arrangement (consistent with the provisions of State and local law relative to the practice, performance, and delivery of health services) with one or more physicians . . . under which provision is made for the periodic review by such physicians of covered services furnished by . . . nurse practitioners, the supervision and guidance by such physicians of . . . nurse practitioners, the preparation by such physicians of such medical orders for care and treatment of clinic patients as may be necessary, and the availability of such physicians for such referral of and consultation for patients as is necessary and for advice and assistance in the management of medical emergencies; and, in the case of a physician-directed clinic, has one or more of its staff physicians perform the activities accomplished through such an arrangement; 42 USCA § 1395x (aa) (2) (B).

The "covered services" referred to in the above provision are elsewhere defined in the federal law:

[P]hysicians' services and such services and supplies . . . if furnished as an incident to a physician's professional service,

[S]uch services furnished by a . . . nurse practitioner and such services and supplies furnished as an incident to his service as would otherwise be covered if furnished by a physician or as an incident to a physician's service, . . . 42 USCA § 1395x(aa) (1) (A) (B).

[S]ervices and supplies (including drugs and biologicals which cannot, as determined in accordance with regulations, be self-administered) furnished as an incident to a physician's professional service, of kinds which are commonly furnished in physicians' offices and are commonly either rendered without charge or included in the physicians' bills; 42 USCA § 1395x(s) (2) (A).

Honorable Richard M. Webster

[A] . . . nurse practitioner . . . performs such services as such individual is legally authorized to perform (in the State in which the individual performs such services) in accordance with State law (or the State regulatory mechanism provided by State law), and who meets such training, education, and experience requirements (or any combination thereof) as the Secretary may prescribe in regulations. 42 USCA § 1395x(aa)(3).

A registered professional nurse is authorized by state law to do the following:

. . . [perform] for compensation . . . any act which requires substantial specialized education, judgment and skill based on knowledge and application of principles derived from the biological, physical, social and nursing sciences, including, but not limited to:

(a) Responsibility for the teaching of health care and the prevention of illness to the patient and his family; or

(b) Assessment, nursing diagnosis, nursing care, and counsel of persons who are ill, injured or experiencing alterations in normal health processes; or

(c) The administration of medications and treatments as prescribed by a person licensed in this state to prescribe such medications and treatments; or

(d) The coordination and assistance in the delivery of a plan of health care with all members of the health team; or

(e) The teaching and supervision of other persons in the performance of any of the foregoing; Section 335.016(8), RSMo 1978.

Honorable Richard M. Webster

Medicare is funded under the auspices of the federal government without state financial participation. Medicaid is predominantly funded by the federal government but there is significant state financial participation. Accordingly, payment for Medicare services is governed entirely by federal laws and regulations. Payment for Medicaid services is governed by both federal law and regulations and any complementary and consistent state law and regulations that may exist. The law of this state pertaining to Medicaid is set forth in Chapter 208, RSMo and Section 208.152 specifically identifies separate categories of services and supplies eligible for state financial participation in the partially federally funded Medicaid program.

In light of the above, and in response to your first question, we are of the opinion that the services of a registered professional nurse which are within the parameters of Section 335.016(8) could be eligible for Medicare payments if and to the extent that the federal government or its officers and agents determine such services to be compensable according to the federal rural health clinic laws and regulations. We are of the further opinion that services of a registered professional nurse which are within the parameters of Section 335.016(8) could be eligible for Medicaid payments under the Federal Rural Health Clinic law and regulations and the complementary state law, Section 208.152. Therefore, it is the opinion of this office that Missouri state law would not prohibit payment pursuant to the Rural Health Clinics so long as such services are authorized by Section 335.016(8), RSMo.

In response to your second question, it is our opinion that Section 335.016(8) authorizes a registered professional nurse to make a nursing diagnosis on ill or injured persons, as distinguished from a medical diagnosis, absent either the direct or general supervision of a licensed physician.

Very truly yours,



JOHN ASHCROFT
Attorney General

ELECTIONS: Provisions of § 115.157, RSMo, authorize
REGISTRATION: an election authority having registration
information in computerized form to determine
whether or not tapes or printouts will be furnished to candidates
upon request without charge. If such tapes or printouts are
furnished to any candidates upon request and without charge, they
must be furnished to all candidates within the jurisdiction of
the election authority upon request and without charge.

May 13, 1980

(See Section 115.157 as amended by
Senate Bill 526, 81st General Assembly) OPINION NO. 107

The Honorable Irene E. Treppler
Representative, District 106
4681 Fuchs Road
St. Louis, Missouri 63128



Dear Ms. Treppler:

This letter is in response to your question asking whether a candidate can be required to pay for computerized voter lists. You refer to § 115.157, RSMo, which was enacted in 1977, effective January 1, 1978.

Section 115.157, RSMo, provides:

The election authority may place all information on any registration cards in computerized form. No election authority shall furnish to any member of the public a tape or printout showing any registration information, except the election authority may furnish tapes and printouts showing only voters' names, addresses, townships or wards, and precincts for a reasonable fee determined by the election authority. The election authority that has registration records in computerized form shall have printed in even-numbered years a copy of the voter registration list. Such tape or printout may be furnished to all candidates upon request without charge. (Emphasis added).

Our review of the legislative history of § 115.157 indicates that the last two sentences of that section were added after the legislation was introduced.

The Honorable Irene E. Treppler

The last sentence in § 115.157 provides that such tape or printout may be furnished to all candidates upon request without charge. In determining whether a statute is directory or mandatory, the prime object is to ascertain the legislative intention disclosed by the terms of the statute in relation to the subject of legislation and the general object to be achieved. State v. Brown, 33 S.W.2d 104 (Mo. Banc 1930). A statute which merely requires certain things to be done which nowhere prescribes the result that shall follow if such things are not done is generally "directory." State v. Heath, 132 S.W.2d 1001 (Mo. 1939). And, it has been said that the word "may" is sometimes construed as mandatory but more frequently is directory. State v. Blair, 151 S.W. 148 (Mo. 1912).

The word "may" is used three times in § 115.157. The first use of the word "may" with respect to the election authority placing the registration information in computerized form is clearly permissive. The word "may" is next used with respect to the furnishing of such tapes or printouts to members of the public for a reasonable fee determined by the election authority. The word "may" is used for a third time in that section with respect to the particular question we have at hand concerning whether candidates may receive such tapes upon request without charge.

By comparison, the word "shall" is used twice in § 115.157. The first time with respect to the initial prohibition against furnishing members of the public with tapes or printouts showing registration information; and the second time with respect to the printing of a copy of the voter registration list in even numbered years by election authorities which have the registration records in computerized form. The word "shall" in these instances is used in a mandatory sense.

It is our view that the use of the word "may" is merely directory in all of the instances in which it is used. We believe that the legislature in using the word was sufficiently knowledgeable to expect that the word "may" would be taken as directory in light of the fact that it has been generally treated as such by the courts. It is clear that the refusal of the election authority to furnish such tapes or printouts free to any candidates upon their request within the area of the election

The Honorable Irene E. Treppler

authority may result in there being a difference of treatment in different election areas. Some difference obviously already exists because not all election authorities will have the information in computerized form. However, we do not find this result constitutionally objectionable. On the other hand, it is also clear that once such tapes or printouts are furnished free on request to any candidates within the area of the election authority, they must be furnished on the same terms to all candidates. To conclude otherwise would create obvious inequities which cannot constitutionally exist.

In addition, we are aware of the fact that the costs of furnishing such tapes or printouts is quite large. As a consequence, this cost factor, if we held otherwise, might entice persons to file as a candidate for a particular office in order to obtain the tapes or printouts merely at the expense of the filing fee. We assume that the legislature must have been aware that these difficulties would exist and that they accordingly intended to vest the determination of whether or not such tapes or printouts would be furnished without charge to all candidates, upon request, in the election authority.

CONCLUSION

It is the opinion of this office that the provisions of § 115.157, RSMo, authorize an election authority having registration information in computerized form to determine whether or not tapes or printouts will be furnished to candidates upon request without charge. If such tapes or printouts are furnished to any candidates upon request and without charge, they must be furnished to all candidates within the jurisdiction of the election authority upon request and without charge.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

April 8, 1980

OPINION LETTER NO. 108
(Answer by Letter-Klaffenbach)

The Honorable Robert Jackson
Representative, 134th District
306 Howard Street
Greenfield, Missouri 65661



Dear Mr. Jackson:

This letter is in response to your questions asking:

1. May the Board of Trustees acting through the County Court of a third class county lease property to a Not-for-Profit corporation for the construction and operation of a medical clinic and if so, for what period of time may the lease be?
2. May the Board of Trustees of a County Hospital of a third class county acting through the County Court construct a medical clinic and lease the same to a Not-for-Profit professional corporation of doctors and if so, for what period of time?
3. May the Board of Trustees of a County Hospital of a third class county acting through the County Court sell excess land on which said hospital is located to a Not-for-Profit professional medical corporation for the construction of a medical clinic?

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4. If the answer to any of the foregoing questions are yes, may said lease or deed contain restrictions limiting the use of such property as a medical clinic for doctor offices and prohibit the duplication of services performed at said hospital?

You also state:

Cedar County Memorial Hospital is a county hospital located in El Dorado Springs, Cedar County, Missouri. Cedar County is a third class county.

Osage Prairie Rural Health Corporation is a Not-for-Profit Corporation, funded by a Rural Health Initiative grant from the Public Health Service.

All physicians located in El Dorado Springs, Missouri are presently associated with Osage Prairie Rural Health Corporation as employees of said corporation. The physician employees of Osage Prairie Rural Health Corporation presently operate out of different locations, and Osage Prairie Rural Health Corporation is presently considering the construction of a modern medical clinic to consolidate the offices of all physicians and dentists employed thereby.

It is hoped that the construction of a new medical clinic by Osage Prairie Rural Health Corporation would attract and expand the number of doctors practicing medicine in El Dorado Springs, Missouri, and as a result thereof, would be a direct benefit to Cedar County Memorial Hospital in increasing the patient load of said hospital.

The Board of Trustees of Cedar County Memorial Hospital feel that several direct benefits would occur to Cedar County Memorial Hospital by the construction of a medical clinic on land adjacent to Cedar County Memorial Hospital and now owned by the County Court of Cedar County, Missouri, e.g.,

The Honorable Robert Jackson

- 1) The increase of the number of physicians and dentists on the staff of Cedar County Memorial Hospital and increased usage of the facilities of Cedar County Memorial Hospital;
- 2) The proximity of offices of medical doctors making the same more readily available at Cedar County Memorial Hospital in cases of emergencies;
- 3) The attraction of additional qualified physicians to the staff of Cedar County Memorial Hospital and reductions of costs to patients and increased services thereby.

Your first question asks whether the Board of Trustees acting through the county court of a third class county may lease property to a not-for-profit corporation for the construction and operation of a medical clinic and if so, the period of time for which the lease may be made.

In Att'y Gen. Op. No. 224, Graham, August 20, 1968, we concluded that the county court and the hospital board of trustees are not authorized to purchase land adjacent to a hospital site and lease the land at a nominal cost to a private not-for-profit corporation for the purpose of building a medical facility to provide office space for physicians with the physicians paying a nominal rent to the county for the use of such office space or to lease the land to a group of two or more physicians for a nominal rental for the purpose of the physicians building a facility to provide office space for physicians. In Att'y Gen. Op. No. 169, Maddox, October 18, 1978, we concluded that the provisions of § 205.161, RSMo, authorizing the use of revenue bonds for the construction of hospital "related" facilities does not authorize the construction of a building to be rented to physicians and dentists for their professional use. In Att'y Gen. Op. No. 157, Sprick, August 9, 1979, we concluded that the hospital board of trustees has no authority to purchase a building with hospital funds and to lease it to a doctors group since such authority was neither expressly granted nor necessarily implied from those powers granted. In Att'y Gen. Op. No. 80, Sprick, March 25, 1980, we concluded that the county hospital board of trustees did not have the authority to enter into an agreement with the University of Missouri School of Medicine under which the board of trustees would purchase a medical clinic building for the purpose of its being operated by the University of Missouri School of Medicine. In Att'y Gen. Op. No. 1, Adams, February 28, 1946, we concluded that the county court has power to sell county land, in that case former county hospital land.

The Honorable Robert Jackson

In Att'y Gen. Op. No. 92, Volkmer, July 28, 1961, we concluded that the county court may lease out real property of the county for short periods but may not enter into a lease for a term of 99 or 20 years. Likewise, in Att'y Gen. Op. No. 5, Wessel, January 12, 1970, we concluded that the county court may lease county property for short terms to individuals when the county has no immediate need of the facility for county purposes. We enclose copies of these opinions.

In 1975 the legislature enacted what is now § 205.374, RSMo, which provides the procedure by which the hospital board of trustees may "sell the county hospital property, both real and personal." It seems clear that that section was intended to apply to county hospitals having a board of trustees organized under §§ 205.160 to 205.340. It is not clear why the section was at first designated as § 205.372 and later changed to § 205.374, which placed it in the sections relating to other county hospitals under § 205.350, RSMo, et seq. Apparently that section, however, pertains only to the sale of the county hospital itself, including real and personal property and not to parts or segments of what is known as county hospital grounds.

We have set out the numerous opinions described above in order that you may have the full benefit of our views on the subject about which you inquire.

We understand that the land was acquired by gift from private persons in the approximate amount of 10 acres for the county hospital; that the parcel in question is approximately 200' x 200', that there are no deed restrictions regarding the sale or lease, and that there are no buildings on the parcel. We also understand that the title to the land is in the county court. As a consequence, we believe that the county court may, with the approval of the Board of Trustees, sell or lease the land within certain limitations, as expressed in the enclosed opinions. We do not believe that § 205.374 was intended to limit the authority of the county court to make sales of what is properly county property. We believe that § 205.374 was only intended to establish and make certain the procedure for the board of trustees and the judges of the county court to sell all of the county hospital property. In other words, we do not believe that such statute was intended to limit the authority the county court had prior to the enactment of the statute.

In addition, we wish to point out with respect to your first question that, as our enclosed opinions indicate, a lease (or a sale) of such surplus property could only be made on the basis

The Honorable Robert Jackson

that the property is surplus and not needed by the county or the county hospital and must be for actual value and not for a nominal consideration.

We believe that your second question asking whether the Board of Trustees may construct a medical clinic and lease it to a not-for-profit professional corporation is answered by the opinions which we have enclosed. Clearly there is no such authority.

We believe we have already answered your third question asking whether the Board of Trustees may sell excess lands on which the hospital is located to a not-for-profit professional medical corporation for the construction of a medical clinic. That is, there is authority for the county court to sell excess land but not to favor any such corporation insofar as the terms and conditions of the sale are concerned.

Finally, in light of our enclosed opinions, we do not believe that the county court could accomplish a transfer of the property by sale or lease to such a group by the use of such conditions or restrictions.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures

Att'y Gen. Op. No. 224,
Graham, 8/20/68
Att'y Gen. Op. No. 169,
Maddox, 10/18/78
Att'y Gen. Op. No. 157,
Sprick, 8/9/79
Att'y Gen. Op. No. 80,
Sprick, 3/25/80
Att'y Gen. Op. No. 1,
Adams, 2/28/46
Att'y Gen. Op. No. 92,
Volkmer, 7/28/61
Att'y Gen. Op. No. 5,
Wessel, 1/12/70

ELECTIONS: When an election is held in a political sub-
NEWSPAPERS: division or a special district which is located
COUNTY CLERK: within the jurisdiction of more than one elec-
PUBLIC NOTICES: tion authority in situations where the provi-
sions of § 115.023, subsections 3 and 4, are not
applicable that the notice of election is to be
given by the election authority of the county with the greatest
proportion of the political subdivision's or special district's
registered voters, and that if two newspapers of different politi-
cal faith which are qualified under Chapter 493, RSMo, are pub-
lished within the bounds of the area holding the election, the
notice is to be published in such newspapers. If there is only
one such newspaper, then the notice shall be published in such
newspaper. If there is no newspaper published within the bounds
of the election area, then the notice shall be published in two
qualified newspapers of different political faith serving the area.
The election authority may provide any additional notice of the
election it deems desirable.

May 22, 1980

OPINION NO. 109

The Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Post Office Box 301
Maysville, Missouri 64469

Dear Mr. Paden:

This letter is in response to your question asking:

An interpretation of sub-paragraph 2 of
Section 115.127, RSMo., relative to the
publication of notice of election. The
question is: If there is only one news-
paper qualified under Chapter 493, RSMo.,
within the county in which the majority
part of a fourth class city is located in
or the majority of a school district
encompassing one or more counties and
there is no newspaper qualified under
Chapter 493 published either in the city
or in any part of the school district, must
legal notice of election be published in
the only newspaper qualified under Chapter
493 in the county in which the largest part
of the city or school district exists.

Subsection 2 of § 115.127, RSMo Supp. 1979, to which you
refer, provides:

Except as provided in subsections 1 and 4
of this section and in sections 115.521,

The Honorable Robert B. Paden

115.549 and 115.593, the election authority shall cause legal notice of each election held in its jurisdiction to be published. The notice shall be published in two newspapers of different political faith and qualified under chapter 493, RSMo, which are published within the bounds of the area holding the election. If there is only one so qualified newspaper, then notice shall be published in only one newspaper. If there is no newspaper published within the bounds of the election area, then the notice shall be published in two qualified newspapers of different political faith serving the area. Notice shall be published twice, the first publication occurring in the second week prior to the election, and the second publication occurring within one week prior to the election. Each such legal notice shall include the date and time of the election, the name of the officer or agency calling the election and a sample ballot; and, unless notice has been given as provided by section 115.129, the second publication of notice of the election shall include the location of polling places. The election authority may provide any additional notice of the election it deems desirable.

It is our understanding that your question does not involve a situation in which the affected election authorities under subsection 3 of § 115.023, RSMo, authorize one of their number to conduct the election for all or any part of the political subdivision or special district. It is also our understanding that you are not asking about the situation where the clerk or secretary of any political subdivision or special district is to conduct the election for the political subdivision or special district as provided in certain circumstances under subsection 4 of § 115.023. It appears, therefore, that the question to be answered is as to the notice required when an election is to be conducted for a political subdivision or special district and the political subdivision or special district is located within the jurisdiction of more than one election authority, and the provisions of subsections 3 and 4 of § 115.023 are not applicable.

The Honorable Robert B. Paden

Subsection 2 of § 115.023, RSMo, provides as follows:

When an election is to be conducted for a political subdivision or special district, and the political subdivision or special district is located within the jurisdiction of more than one election authority, the election authority of the jurisdiction with the greatest proportion of the political subdivision's or special district's registered voters shall be responsible for publishing any legal notice required in section 115.127 or 115.521.

Under the provisions of such subsection, in such a situation, the election authority of the jurisdiction with the greatest proportion of the political subdivision's or special district's registered voters shall be responsible for publishing legal notices. Subsection 2 of § 115.127, quoted supra, is applicable in such a situation. It is crystal clear under the provisions of § 115.127 (2) that if there are two newspapers of different political faith published within the bounds of the area holding the election, that is, within the bounds of the political subdivision or the special district holding the election, notices are to be published in such newspapers. If there is only one newspaper published in the area holding the election, that is, within the political subdivision or within the boundaries of the special district, the notice is to be published in such newspaper. If there is no newspaper published within the bounds of the election area, that is, within the bounds of the political subdivision or the special district, then the notice shall be published in two qualified newspapers of different political faith serving the area. The election authority may provide any additional notice of the election it deems desirable.

CONCLUSION

It is the opinion of this office that when an election is held in a political subdivision or a special district which is located within the jurisdiction of more than one election authority in situations where the provisions of § 115.023, subsections 3 and 4, are not applicable that the notice of election is to be given by the election authority of the county with the greatest proportion of the political subdivision's or special district's registered voters, and that if two newspapers of different political faith which are

The Honorable Robert B. Paden

qualified under Chapter 493, RSMo, are published within the bounds of the area holding the election, the notice is to be published in such newspapers. If there is only one such newspaper, then the notice shall be published in such newspaper. If there is no newspaper published within the bounds of the election area, then the notice shall be published in two qualified newspapers of different political faith serving the area. The election authority may provide any additional notice of the election it deems desirable.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", followed by a long horizontal flourish line extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

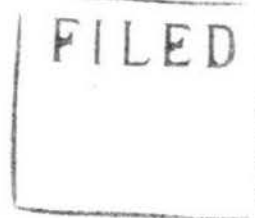
(314) 751-3321

December 23, 1980

OPINION LETTER No. 111

(Answered by letter--Jones)

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

Does a foreign railroad corporation pay an additional domestication fee when there has been an increase in the proportion of its stated capital and surplus represented by its property and business in Missouri due to the merger of a domestic railroad corporation into the qualified foreign railroad corporation?

In your opinion request, you have provided additional information which indicates that a railroad company which is a Missouri domestic corporation has merged into a Delaware corporation which has been set up as a shell without assets. You state that the Delaware corporation was qualified in Missouri prior to the merger as a railroad company doing business under an assumed name. You state further that the Delaware corporation had no assets in Missouri and conducted no business and paid only the minimum domestication fee of \$63. You further state that after the merger, the assets and business of the Delaware corporation which is now qualified in Missouri as a foreign corporation, have increased substantially.

It is also our understanding that the railroad corporation has suggested that by virtue of the application of Art. XI, § 10 of the Mo. Constitution no additional domestication or qualification fees or taxes should be imposed under the provision of subsection 3 of § 351.600, RSMo Supp. 1979, upon the railroad's increased stated capital and surplus which is represented by its property and business in Missouri due to the merger. In this regard, § 10 of Art. IX of the Mo. Constitution reads in part as follows:

If any railroad corporation organized under the laws of this state shall consolidate by sale or otherwise, with any railroad corporation organized under the laws of any other state, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this state shall retain jurisdiction in all matters which may arise as if said consolidation had not taken place. . . .

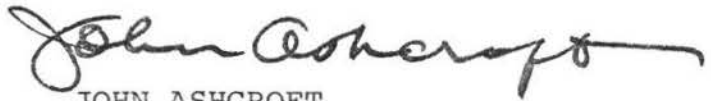
Under the above constitutional provision, it is our understanding that the railroad corporation contends that although it should be regarded as a foreign corporation for most purposes, it is nevertheless a domestic corporation under the above constitutional provision for the reason that the provision is broad enough to include the merger that was consummated and it is therefore not subject to any increased domestication or qualification fees or taxes under the provisions of subsection 3 of § 351.600, RSMo Supp. 1979.

After due consideration, it is our view that the foregoing argument by the railroad corporation is not persuasive. It was also held in Attorney General Opinion Letter No. 3, Kirkpatrick, 2-22-74, that when a foreign corporation which had previously qualified to do business in Missouri and subsequently absorbed in a merger a foreign or domestic corporation so that the surviving corporation was a continuation of the foreign corporation which had previously qualified to do business in Missouri, the surviving corporation is not then entitled to receive credit for those taxes or fees previously paid by the merging domestic or foreign qualified corporation. (Copy of opinion attached).

The Honorable James C. Kirkpatrick
Page 3

Therefore, in response to the question that you have presented, it is our opinion that a foreign railroad corporation is required to pay an additional domestication fee or tax when there has been an increase in the proportion of its stated capital and surplus represented by its property and business in Missouri due to the merger of a domestic corporation into the qualified foreign railroad corporation.

Sincerely,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal stroke extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure: Opinion Letter No. 3,
Kirkpatrick, 2-22-74

COUNTIES: Under the provisions of § 33.095, RSMo,
OFFICE OF ADMINISTRATION: in every county other than a first class
MILEAGE: charter county, county employees who are
COUNTY JUDGES: paid a mileage allowance or reimbursement
will have that allowance or reimbursement
computed at the rate of seventeen cents per mile, as set by order of
the Commissioner of Administration, unless a higher rate is specifically authorized by statute. The seventeen cent per mile rate will prevail over the ten cent per mile rate provided for county court judges of second class counties under § 49.100, RSMo, although mileage can only be paid for travel authorized by § 49.100. Such a county court does not have authority to pay a mileage allowance to such employees other than the seventeen cents per mile authorized by the Commissioner of Administration or a higher rate, if authorized by a statute. Section 33.095 has no effect on sheriffs' mileage fees which are taxable as court costs.

May 23, 1980

OPINION NO. 112

The Honorable Thomas J. Brown, III
Prosecuting Attorney
Cole County Courthouse, Rm. 400
Jefferson City, Missouri 65101



Dear Mr. Brown:

This opinion is in response to your questions asking:

- (1) Does the limitation of 10¢ per mile for mileage allowance for judges of the county court, as specified in Section 49.100, RSMo 1978, extend to county employees as well as county judges?
- (2) May the county court exercise its own discretion in establishing a mileage allowance for county employees, or is such allowance restricted to the reimbursement computation as specified by Section 33.095, RSMo 1978?
- (3) Does the letter from the Commissioner of Administration to presiding judges of the county courts, dated July 23, 1979, constitute an order such as the mileage allowance reimbursement level be increased to 17¢ per mile; if not, what are the specific requirements for the issuance of an 'order'?

The Honorable Thomas J. Brown, III

Section 33.095, RSMo, provides:

Other provisions of law notwithstanding, in every instance where an officer or employee of the state or any county, except first class counties with a charter form of government, is paid a mileage allowance or reimbursement, the allowance or reimbursement shall be computed at the rate of ten cents per mile unless a higher rate is specifically authorized by statute or order of the commissioner of administration.

Section 49.100, RSMo, provides:

The judges of the county court in counties of the second class shall receive the sum of ten cents per mile for each mile actually and necessarily traveled in the performance of their official duties. All claims for reimbursement for mileage shall be in writing, and signed by the judge making claim therefor, and filed with the clerk of the county court. Every such claim shall show the miles traveled, the date of each trip, the nature of the business, and the places to and from which such judge has traveled during the period covered.

We understand that you have a copy of Att'y Gen. Op. No. 39, Stevenson, March 11, 1980. In that opinion we concluded that county judges in second class counties should be reimbursed at the rate of ten cents per mile for each mile actually traveled in the performance of their official duties pursuant to § 49.100. In answer to your first question it is clear that § 49.100 pertains only to county court judges in such counties. After you asked these questions and after Opinion No. 39 was issued, the Commissioner of Administration promulgated an emergency rule and a proposed rule (1 CSR 10-11.020) filed with the Secretary of State, March 28, 1980, effective, respectively, April 7, 1980, and July 11, 1980; copy enclosed. The rule provides:

Where an officer or employee of any county, except first class counties with a charter form of government, is paid a mileage allowance or reimbursement, the allowance or reimbursement shall be computed at a rate not to exceed seventeen cents per mile.

The Honorable Thomas J. Brown, III

This rule appears to authorize a county court to fix a mileage rate of less than seventeen cents a mile. However, it is our view that § 33.095, RSMo, which provides authority for the Commissioner of Administration to fix such mileage reimbursement, does not authorize the Commissioner to allow a county court to fix a mileage rate which is less than seventeen cents per mile. Therefore, the seventeen cent rate is applicable to all such county officers and employees. Accordingly, we withdraw Opinion No. 39-1980. However, we note that all the provisions of § 49.100, except the mileage rate of ten cents, remain in effect.

Your second question asks whether the county court may exercise its discretion in establishing a mileage allowance for county employees. We answered that question, in part, above. Section 33.095 and the order of the Commissioner of Administration expressly cover officers and employees of any county except first class counties with a charter form of government who are paid mileage. The statute does not allow the county court any discretion in fixing mileage rates.

Your third question is now moot and does not require an answer.

In addition, it should be clear that the provisions of § 33.095 relate to the mileage allowance to such employees and neither that section nor the order of the Commissioner of Administration has any effect on mileage rates taxable as court costs for sheriffs' services which are paid into the county treasury.

CONCLUSION

It is the opinion of this office that under the provisions of § 33.095, RSMo, in every county other than a first class charter county, county employees who are paid a mileage allowance or reimbursement will have that allowance or reimbursement computed at the rate of seventeen cents per mile, as set by order of the Commissioner of Administration, unless a higher rate is specifically authorized by statute. The seventeen cent per mile rate will prevail over the ten cent per mile rate provided for county court judges of second class counties under § 49.100, RSMo, although mileage can only be paid for travel authorized by § 49.100. Such a county court does not have authority to pay a mileage allowance

The Honorable Thomas J. Brown, III

to such employees other than the seventeen cents per mile authorized by the Commissioner of Administration or a higher rate, if authorized by a statute. Section 33.095 has no effect on sheriffs' mileage fees which are taxable as court costs.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

June 6, 1980

OPINION LETTER 113
(Answered by Letter - Sill)

Dr. James Frank, President
Lincoln University
P. O. Box 29
Jefferson City, Missouri 65102



Dear Dr. Frank:

This is in response to your request for an official opinion from this office which poses the following question:

"Does the anti-nepotism statute (Section 172.310) prohibit the employment by Lincoln University of the spouse of the President of the University assuming that the President has no function in her being hired or fired."

Your question involves not only an interpretation of the section of the revised statutes of Missouri cited in your question, but more fundamentally involves a provision found in Article VII, Section 6 of the Missouri Constitution on the same subject, which states as follows:

"Any public officer or employee in this state who, by virtue of his office or employment, names or appoints to public office or employment, any relative within the 4th degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

To answer your question, it must first be determined what individual or individuals have legal authority to "hire and fire" the faculty and staff of Lincoln University. To do this, it is first necessary to briefly examine the statutory provisions relating to Lincoln University.

Lincoln University was established and operates in accordance with the provisions of Chapter 175 RSMo 1978. Section 175.040

RSMo 1978, sets forth the power and authority of the governing body of the university known as the Board of Curators. That provision provides:

"It is hereby provided that the Board of Curators of the Lincoln University shall organize after the manner of the Board of Curators of the State University of Missouri; it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the Board of Curators of the Lincoln University shall be the same as those prescribed by statute for the Board of Curators of the State University of Missouri, except as stated in this chapter."

As is readily apparent, the Board of Curators of Lincoln University literally "stands in the shoes" of the Board of Curators of the University of Missouri. Therefore, we must look at the statutory powers of the University of Missouri Board of Curators. These powers are found in Chapter 172 RSMo 1978. More specifically, Section 172.300 RSMo 1978, makes provision for the employment of faculty and employees of the University. This section provides in part:

"The curators may appoint and remove, at discretion, the president, deans, professors, instructors and other employees of the university; define and assign their powers and duties, and fix their compensation, ..."

This provision is extremely broad in its scope. However, it is very clear from the wording that the Board of Curators of the University of Missouri, and therefore of Lincoln University, have the authority to employ and remove all personnel. Further, the Board has the power to define specific duties and functions for its employees, including the president of the University. It must be noted further that there are no exceptions to the powers of the Board of Curators of Lincoln University as provided in Chapter 175 RSMo 1978.

It is our understanding that neither the president nor any other officer or employee of the University has been given general authority to hire or fire employees of the University. It follows, therefore, that the Board of Curators has completely retained this power for itself. It then follows logically that the Board of Curators as a legal entity has the sole power and responsibility for hiring and firing any and all employees of Lincoln University.

Dr. James Frank, President
Page Three

Although this opinion is responding to your question in terms of the constitutional prohibition against nepotism, our response will be couched also in terms of the Section 172.310, which is simply an extension of Article VII, Section 6, of the Missouri Constitution. Section 172.310 RSMo 1978 provides as follows:

"No person who is related by blood or marriage to any member of the Board of Curators of the University shall be appointed to any position in the University as officer, member of any faculty or employee."

Assuming that this section applies equally to Lincoln University as to the University of Missouri, it is our conclusion that the hiring of the spouse of the President of Lincoln University does not violate either this statute or the constitutional provisions found in Article VII, Section 6, of the Missouri Constitution, assuming that the President and his spouse are not related to any member of the Board of Curators. This conclusion is based on the fact that the President of Lincoln University does not have the legal authority to hire or fire employees, but that the same resides in the duly constituted Lincoln University Board of Curators.

CONCLUSION

Therefore, it is the opinion of this office that neither the anti-nepotism statute, Section 172.310 RSMo 1978, nor the anti-nepotism provision found in Article VII, Section 6, of the Missouri Constitution, prohibit the employment by Lincoln University of the spouse of the President of the University.

Very truly yours,


John Ashcroft
Attorney General

April 3, 1980

OPINION LETTER NO. 116
(Answer by Letter-Klaffenbach)



Honorable John Dennis
Senator, 27th District
Room 428A, Capitol Bldg.
Jefferson City, Missouri 65101

Dear Senator Dennis:

This letter is in response to your question asking whether Lloyd G. Briggs who was removed from office as Circuit Judge of the 33rd Judicial Circuit of Missouri by the Missouri Supreme Court, may run for the primary election and, if successful in the primary, the general election for the office from which he was ousted.

It is our understanding from the opinion of the Missouri Supreme Court in the case of In the matter of the Honorable Lloyd G. Briggs, No. 61742, dated March 20, 1980, that Mr. Briggs served as Scott County Magistrate from January, 1971, until his appointment to the circuit bench by Governor Teasdale on March 6, 1979, to fill a vacancy occasioned by the retirement of the incumbent circuit judge. It is also our understanding that the incumbent who retired was serving a term which is to expire December 31, 1982.

The only question we are concerned with here is whether Mr Briggs may be a candidate to fill the unexpired portion of the retired judge's term after having been ousted from that portion of the term to which he was appointed by the Governor.

Honorable John Dennis

The Order of the Missouri Supreme Court which was issued on March 28, 1980, merely stated that "he is hereby removed from office of Circuit Judge of the 33rd Judicial Circuit of Missouri." The allegations of misconduct which brought about Mr. Briggs' ouster took place while he served in the office of Scott County Magistrate. In supporting such grounds as a basis for ouster the Supreme Court concluded that despite some diversity of authority regarding the issue the prior conduct of a judge in a subordinate judicial office may provide the basis for ouster. In this instance the Court was considering the conduct of the judge in a subordinate judicial office and not the conduct of the judge in a prior term in the same office.

The conflicting rules of law were set forth by the Kentucky Court of Appeals in Graham v. Jewell, 263 S.W. 693 (Ky.App. 1924), in which the court noted that the first rule is that where by statute a removal carries with it a disqualification to hold office in the future, the removal may be had for acts committed during a prior term of office. The court further noted that in the absence of such statute some courts have held that each term of office is separate and distinct and an incumbent may not be removed for misconduct in another office or an offense committed prior to his present term. The reason for this is that each term of office is a separate entity; that a removal in the absence of a statute of disqualification does not extend beyond the term; that the people in the selection of an officer, may condone a past delinquency and reelect him, and that in the succeeding term he is only liable for delinquencies occurring therein. Another line of cases concludes that the object of the removal of a public officer for official misconduct is not to punish the officer but to improve the public service and to free the public of an unfit officer. Such cases proceed upon the theory that the officer's acts during the previous term quite effectually stamp him as unworthy and that reelection does not condone the offense.

It appears that the Order of the Supreme Court of Missouri in ousting Mr. Briggs from office for acts committed during a prior term in a subordinate judicial office is based on the conclusion of the Court that Mr. Briggs' conduct rendered him unqualified to serve in the role of judge.

In view of the constitutional authority of the Missouri Supreme Court to oust judicial officers for violations of the Judicial Canons, adherence to which is a qualification for judicial office, it is clear the Court has the authority to consider such an ouster as a bar to further judicial service. In

Honorable John Dennis

our view the action of the Court based on violations occurring in a subordinate office raises the presumption that such acts of Mr. Briggs render him as unworthy and unqualified to hold the office of circuit judge. We conclude that Mr. Briggs does not have the right to run for election for the unexpired term of the retired judge, which is essentially the office from which he has been ousted.

This office does not perform a judicial function and does not purport to have the authority to make a judicial determination with respect to the question you ask. For this reason it may well be that the parties in interest will wish to seek a final determination of this question before a court of competent jurisdiction.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

April 10, 1980

OPINION LETTER NO. 120

Honorable James C. Kirkpatrick
Secretary of State
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This letter is in response to your request for an opinion of this office asking:

Should Lloyd G. Briggs be certified as a candidate for Circuit Judge of the 33rd Judicial Circuit for the August 5, 1980 primary election?

In our Opinion No. 116 dated April 3, 1980, to Dennis, copy enclosed, we set out the basic facts of the situation involving the ouster of Mr. Briggs and our interpretation of the holding and the Order of the Supreme Court of Missouri in In the matter of the Honorable Lloyd G. Briggs, No. 61742. We concluded that the Order of the Supreme Court ousting Mr. Briggs from the office of Circuit Judge of the 33rd Judicial Circuit of Missouri precluded Mr. Briggs from running for election for the unexpired term of the retired judge, which is essentially the office from which he was ousted.

We believe that, by virtue of the Court's Order, Mr. Briggs is not eligible to hold such office. Accordingly, we advise you that Lloyd G. Briggs should not be certified as a candidate for Circuit Judge of the 33rd Judicial Circuit for the August 5, 1980, primary election.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enc: Op. No. 116,
Dennis, 4/3/80

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

July 25, 1980

OPINION LETTER NO. 121

The Honorable Richard M. Webster
Senator, 32nd District
1725 South Garrison
Carthage, Missouri 64836

Dear Senator Webster:

You have requested our formal legal opinion on the question whether electricity as a propellant of vehicles using the highways of the state would be subject to taxation pursuant to Article IV, § 30, Constitution of Missouri.

The constitutional section referred to currently provides in the part we deem material:

[A] tax upon or measured by fuel used
for propelling highway motor vehicles
shall be levied and collected as provided by law. . . . Art. IV, § 30(a).

.

For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon . . . motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property

The Honorable Richard M. Webster

taxes), . . . shall be credited to the
state road fund Art. IV, § 30(b).

Prior to adoption of the 1945 Constitution, amendments to the 1875 Constitution in the 1920's had authorized similar taxation to support the construction and maintenance of the state highway system. The taxes first authorized were described as follows:

Any motor vehicle registration fees,
license fees or taxes, authorized by
law, except the property tax thereon,
. . . . Art. IV, § 44a, Constitu-
tion of Missouri 1875 (approved at
elections on November 2, 1920 and
August 2, 1921.)

The subsequent authorization described such taxes in this manner:

All state motor vehicle registration
fees, license taxes or taxes authorized
by law on motor vehicles (except the
property tax on motor vehicles and
state license fees or taxes on motor
vehicle common carriers) and also all
state taxes on the sale or use of motor
vehicle fuels authorized by law,
Art. IV, § 44a, Constitution of Mis-
souri 1875 (approved at election on
November 6, 1928).

The expansion in scope of the constitutional dedication of certain state revenues for highway construction and maintenance purposes seems thus evident, from what started as motor vehicle registration fees or license fees or taxes on motor vehicles, to what is now "all state revenue derived from highway users as an incident to their use . . . [of] the highways of the state"
We believe this language would comprehend any taxes, fees or

The Honorable Richard M. Webster

assessments imposed by law* on electricity that is sold and used to propel passenger or freight vehicles on the public highways and streets of this state, and would accordingly require all such revenues to be placed in the state treasury to the credit of the fund created by § 226.200, RSMo.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

* The tax on "special fuel" authorized by §§ 142.362, et seq., applies to "diesel fuel, liquefied petroleum gas, and all other gases, liquids and substances used or suitable for use to propel motor vehicles except motor fuels or gasoline as defined in section 142.010.

We do not believe that electricity is a "special fuel" within the meaning of § 142.362.

Attorney General of Missouri

JEFFERSON CITY

65102

May 27, 1980

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

OPINION LETTER NO. 123

Paul R. Ahr, Ph.D., M.P.A.
Director, Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Ahr:

This letter is in response to your question asking:

Does the Missouri Department of Mental Health constitute a 'continuing committee' which would be subject to the election campaign reporting requirements set forth in sections 130.011, RSMo 1978, as amended, et seq.

You also state:

The Department of Mental Health receives federal developmental disabilities funds pursuant to Pub. L. No. 95-602. The Department of Mental Health uses these federal developmental disabilities funds to contract with the various regional planning councils on developmental disabilities to promote public education related to the approval of the tax levy for the establishment of sheltered workshops and/or residence facilities and related programs as set forth in sections 205.968 and 205.972, RSMo 1978, as amended.

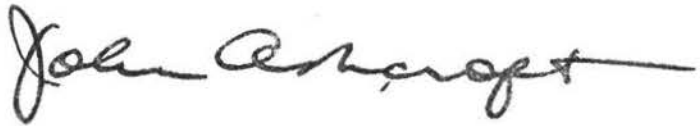
In Opinion No. 193, Mallory, December 28, 1979, we concluded that a board of education which expends district funds to publicize and support the passage of bond issues and tax

Paul R. Ahr, Ph.D., M.P.A.

increases does not come within the reporting requirements of committees under the provisions of Chapter 130, the Campaign Finance Disclosure Law, as amended by Senate Bill No. 129 of the 80th General Assembly. We enclose a copy of that opinion. We also enclose a copy of Opinion No. 179, Schneider, October 3, 1978, which is referred to in Opinion No. 193-1979.

It is our view that our Opinion No. 193-1979 is applicable to the question you asked, and consequently, the Missouri Department of Mental Health does not constitute a "continuing committee," which would be subject to the election campaign reporting requirements of Chapter 130, RSMo, as amended.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosures:

Att'y Gen. Op. No. 193,
Mallory, 12/28/79
Att'y Gen. Op. No. 179,
Schneider, 10/3/78

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

September 9, 1980

OPINION LETTER NO. 124

The Honorable Stephen R. Sharp
Prosecuting Attorney
Dunklin County Courthouse
Kennett, Missouri 63857

Dear Mr. Sharp:

This letter is in response to your question asking whether a dealer as defined in Chapter 301, RSMo, may operate with dealer's license plates a vehicle he has altered as a towing vehicle which he holds for sale. It is our view that subsection 3 of § 301.250 is applicable. Such section provides:

The dealer plates may be displayed on any motor vehicle used by an employee or officer and owned by the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer hired or loaned to others or upon any regularly used service or wrecker vehicle.

We believe that the above provisions are clear. However, the complete answer to your question also depends upon factual conclusions. That is, you have indicated that the dealer in question operates a wholesale automobile auction in Dunklin County and takes cars to different auctions around the area, including other states. The altered vehicles are one-ton trucks which have had a flatbed installed and also a hoist apparatus. These vehicles are for sale at any time and are used until they are sold.

It is our view that from a factual standpoint the vehicles, as altered, are clearly service vehicles. It is likewise our view that the vehicles are most likely "regularly used" within the normal meaning of that terminology as used in the quoted section. The question of the regular use of a vehicle

The Honorable Stephen R. Sharp

is generally addressed by the courts in cases involving automobile insurance. See, for example, Farmers Insurance Co., Inc. v. Morris, 541 S.W.2d 66 (Mo.App., K.C.D. 1976). It appears, however, that regular use of a vehicle is use which is not infrequent or casual but of a more permanent and recurring nature. It is clear to us that the criteria to be used in determining whether there is such a regular use is not solely whether the vehicle is offered for sale.

Clearly, we do not purport to determine factual situations in opinions of this office. The facts that you have given to us, however, appear to indicate that such vehicles are regularly used as service vehicles. Such being the case, it is our conclusion that the use of dealer plates on such vehicles is improper.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", followed by a horizontal line.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 23, 1980

OPINION LETTER NO. 127
(Answered by letter-Sprague)

Honorable Paul Dietrich
Representative, 90th District
Room 203-B, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Dietrich:

You have requested our legal opinion as to the following questions:

1. Is the Division of Health of the Department of Social Services required by state law to issue a certificate of death when an abortion is performed in Missouri regardless of the age of the fetus?
2. If the requirement as to whether a death certificate is to be issued is determined by the number of weeks the fetus has existed since conception, who makes this determination as to age?
3. Is a physician licensed to practice medicine in the State of Missouri required to report to the Division of Health when an abortion is performed regardless of the age of the fetus?
4. If the answer to #3 is in the affirmative, is a death certificate then issued?

"Abortion" is defined in section 188.015(1), RSMo Supp. 1979, as "the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child."

Honorable Paul Dietrich

Preliminarily, it should be noted that an abortion which terminates pregnancy, as described in the second part of the statutory definition, could result in the live birth of an infant whose death would require issuance the filing of a certificate of death, regardless of age of the decedant, pursuant to section 193.130, RSMo 1978.

Inherent in your question, however, is use of the term "abortion" as described in the first part of the statutory definition, that being "the intentional destruction of the life of an embryo or fetus in his or her mother's womb," i.e., in utero, in which instance a live birth would not occur. The essence of your question is whether a certificate of death is required to be filed with the Division of Health upon the occurrence of death of a fetus in utero, regardless of age of the fetus, caused by performance or inducement of an abortion.

The Division of Health of the Department of Social Services is mandated by section 192.060, RSMo 1978, to have charge of the state system of registration of births and deaths. Section 193.030 provides that the Division shall install a statewide system of "vital statistics," defined in section 193.020(8) to include the "regulation, preparation, transcription, collection, compilation and preservation of data pertaining to births, . . . deaths, stillbirths... and data incidental thereto." (Emphasis added.)

Section 193.130 requires that "a certificate of every death or stillbirth shall be filed with the local registrar of the district in which the death or stillbirth occurred within three days after the occurrence is known. . ." (Emphasis added.)

Your question describes a certificate of death as being "issued" by the Division of Health. It should be noted that certificates of death and stillbirth are not issued by the Division but, pursuant to sections 193.130 and 193.140, RSMo 1978, are prepared by the person in charge of interment and are filed with the Division's registrar in the registration district in which the death or stillbirth occurred or the body was found.

"Death" is not defined by Missouri statutes, but authorities generally concur that it means "cessation of life;" i.e., cessation of the evidence of life following live birth. See: Black's Law Dictionary 5th Edition (1979); Stedman's Medical Dictionary, 4th Unabridged Lawyers' Edition (1976); Webster's New World Dictionary, 2d College Edition (1978).

Honorable Paul Dietrich

"Stillbirth" is defined in section 193.020(7) as "a birth after twenty weeks of gestation which is not a live birth." (Emphasis added.)

Missouri statutes require that a "certificate of stillbirth" be filed upon the occurrence of death of a fetus in utero which has exceeded the gestational age of twenty weeks, regardless of whether death was by natural causes, such as spontaneous miscarriage, or by an intentional act, such as abortion.

It should be noted that, in practice, the Division of Health employs the terms "stillbirth" and "fetal death" interchangeably, although the term fetal death is not defined by Missouri statutes. Black's Law Dictionary defines "fetal death" as "the death of a child not yet born. Death in utero of a fetus weighing 500 grams or more. This weight compares roughly to a fetus of twenty weeks or more (gestational age), i.e., a viable fetus."

The Division designates the form of its certificate of stillbirth as a "Certificate of Fetal Death."

In response to your first and second questions:

(a) Neither a "certificate of death" nor a "certificate of stillbirth" is required to be filed with the Division of Health when an abortion is performed in Missouri which results in the death of the fetus in utero, where the gestational age is estimated by the attending physician to be twenty weeks or less.

(b) Pursuant to section 193.130, a "certificate of stillbirth" is required to be filed with the Division of Health upon the occurrence of death of a fetus in utero, whether induced by abortion or the result of spontaneous natural causes, where the gestational age is estimated by the attending physician to be more than twenty weeks.

(c) Should a termination of pregnancy by abortion result in the live birth of an infant, a "certificate of death" is required to be filed with the Division of Health upon the death of the infant.

In response to your third and fourth questions:

(a) A physician licensed to practice medicine in the State of Missouri is required, pursuant to section 188.052, RSMo Supp. 1979, to complete an "individual abortion report" for each abortion performed or induced upon a woman (regardless of the

Honorable Paul Dietrich

age of the fetus), and to submit such report to the Division of Health within forty-five days from the date of the abortion.

(b) There is no statutory requirement that a "certificate of death" be issued by or filed with the Division upon receipt by the Division of an individual abortion report submitted by a physician pursuant to section 188.052.

Very truly yours,

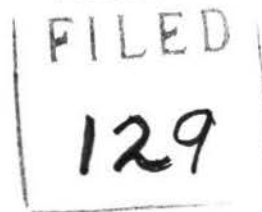
A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

July 30, 1980

OPINION LETTER NO. 129
(Answer by Letter-Sprague)

Honorable Allan G. Mueller
State Senator, District 6
Room 428-B, State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Mueller:

You have requested our legal opinion whether the General Assembly can for the fiscal year 1980-81 appropriate more than \$300,000 for the "emergency financial assistance program" operated under the auspices of the Department of Social Services pursuant to sections 660.150 to 660.200, RSMo Supp. 1979.

The program was established by sections 9 through 19 of House Bills Nos. 545, 21 and 485, an act of the First Regular Session of the 80th General Assembly, which adjourned June 30, 1979. The act was signed by the Governor July 31, 1979, and became effective September 28, 1979.

Section 660.190 of the act provides:

Not more than three hundred thousand dollars from general revenue shall be appropriated by the general assembly for the support of the program established by this act for the first fiscal year and not more than three percent of any funds appropriated shall be used for the administrative expenses involved in administering the program. No funds shall be expended under the provisions of this act until there is a specific appropriation for that purpose. (Emphasis added)

Honorable Allan G. Mueller

Section 33.110, RSMo 1978, states that the fiscal year of the state "shall commence on July first and terminate on June thirtieth following, and the books, accounts and reports of the public officer shall be made to conform thereto. . ."

Although the act establishing the program became effective during fiscal year 1979-80, the first appropriation for the program, in the amount of \$300,000, was authorized by the General Assembly for fiscal year 1980-81.

The substance of your question is whether the phrase "first fiscal year" in that section of the act which limits the amount of appropriations for support of a program established by the act for the first fiscal year, refers to (a) the fiscal year during which the act establishing the program became effective (i.e., fiscal year 1979-80), or (b) the fiscal year for which appropriations for the program were first authorized (i.e., fiscal year 1980-81).

Under (a) above, the General Assembly could authorize an emergency appropriation in January, 1981, in excess of the \$300,000 already authorized for fiscal year 1980-81, because the statutory limitation would apply only to fiscal year 1979-80, for which no appropriations were made.

Under (b) above, the General Assembly could not authorize an emergency appropriation in January, 1981, because any additional appropriations for fiscal year 1980-81 would exceed the \$300,000 already appropriated for that period, and would be prohibited by the limitation imposed by statute for the first fiscal year.

The intent of the General Assembly in employing the phrase "first fiscal year" without further qualification cannot be determined with certainty. There is a lack of case law on this particular question, however, it is our opinion that the phrase denotes the fiscal year during which the act establishing the program became effective, i.e., fiscal year 1979-80, and that, since no appropriation was authorized for the program during its first fiscal year, the General Assembly can appropriate more than \$300,000 for the program for fiscal year 1980-81.

Honorable Allan G. Mueller

According to 86 C.J.S. Time, section 9, the term "fiscal year" means "the year embraced in the annual term for the opening and closing of financial accounts; in the administration of a state or government. . . , a period of twelve months -- not necessarily concurring with the calendar year -- with reference to which its appropriations are made and expenditures authorized, and at the end of which its accounts are made up and its books balanced"

The term "first" can mean "earliest," 36A C.J.S. 488, and the first or earliest fiscal year for which an appropriation could have been authorized for the program was fiscal year 1979-80. The Second Regular Session of the 80th General Assembly could have authorized an emergency appropriation for the program to take effect prior to the end of the fiscal year on June 30, 1980. Instead, however, it authorized a general appropriation in the amount of \$300,000 for fiscal year 1980-81.

Therefore, it may be asserted that the General Assembly failed to authorize an appropriation for the first fiscal year of the program -- the first fiscal year for which an appropriation could have been authorized -- but did authorize an appropriation of \$300,000 for the second fiscal year of the program.

The "fiscal year" for state governmental programs is a fixed, twelve-month period of time, commencing July first each year, and is the annual accounting period for each state program irrespective of whether the program was funded for that period.

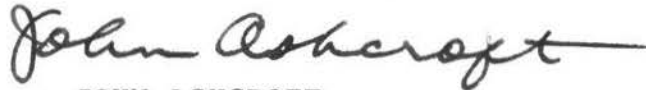
To assert that the first fiscal year for the "emergency financial assistance program" enacted pursuant to section 660.150 et seq., was the fiscal period 1980-81 for which the program was first funded, and not the preceding fiscal period 1979-80 during which the program became effective and could have been funded, would create a void and would have the effect of eliminating the 1979-80 period from the fiscal calendar.

In conclusion, it is our opinion that the General Assembly can appropriate more than \$300,000 during fiscal year 1980-81 for the "emergency financial assistance program" established pursuant to sections 660.150 et seq., RSMo Supp. 1979, and that

Honorable Allan G. Mueller

the \$300,000 limitation on appropriations for support of the program for the first fiscal year would apply to fiscal year 1979-80, for which no appropriations were authorized.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

May 28, 1980

OPINION LETTER NO. 133
(Answer by Letter-Klaffenbach)

The Honorable Charles L. Moore
Prosecuting Attorney of Clark County
500 1/2 North Johnson
Kahoka, Missouri 63445



Dear Mr. Moore:

This letter is in response to your request for an opinion of this office asking:

Does Section 205.042, RSMo, require the Trustees of the County Board of Health Center to take possession of monies now in possession of the former board or nurses and place the monies in the hands of the County Treasurer to be paid out by the new Board of Trustees?

You also state:

Clark County Voters, at an election in April, 1980, voted a 10¢ per hundred levy for a Health Center. The County Court appointed five trustees who have qualified and are acting as such. However, there was in existence a County Health Center which was operating with funds duly appropriated and the nurses have sufficient money to operate the Center until the tax monies are collected this fall.

Should these monies be taken in possession by the new Board or should they let those monies be paid out by the nurses?

The Honorable Charles L. Moore

It is our understanding that there is no such thing as a county board of nurses as such, and there has not been a county health center as such until the election of April, 1980, at which time the health center was authorized, the levy voted, and the trustees thereafter appointed. The county board of nurses to which you refer is apparently the county nursing service which consists of nurses appointed or employed by the county court to perform the county nursing services. We understand that the money of which you speak is federal money, and in addition to the federal money the nursing service receives some state money and also a yearly \$5,000 appropriation from the county court. It is also our understanding that the county court has determined and apparently the new county health center board of trustees has agreed, that the county health center will not be operational to the extent of taking over the services performed with respect to the federal funding until the end of the year, and that until that time the nursing services will operate separately from the county health center, but after such date the nursing services will apparently be placed under the jurisdiction of the county health center board of trustees.

We think that the important thing under these circumstances is whether or not the services which are required to be performed under the federal law with respect to the federal funds are in fact being performed by the county nursing service. It is not readily apparent to us from the information that we have why the county health center board of trustees could not assume the entire service before the end of the year; however, since apparently neither the county court nor the board of trustees intends for such services to be taken over entirely by the county health center until January of 1981, it appears appropriate for the county nursing service to perform such services consistent with the federal requirements until the board of trustees are willing and able to take over such functions.

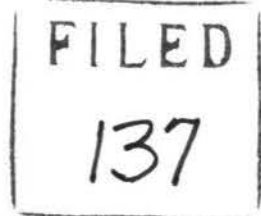
Very truly yours,

JOHN ASHCROFT
Attorney General

June 24, 1980
(Amended as of July 3, 1980)

OPINION LETTER NO. 137

The Honorable Thomas J. Brown, III
Prosecuting Attorney, Cole County
Suite 400, Courthouse
Jefferson City, Missouri 65101



Dear Mr. Brown:

This is in answer to your letter of recent date in which you asked whether an elected city councilman is exempt from the lobbyist registration requirements of the state of Missouri. You further stated that the city councilman about whom you inquire is chairman of the legislative committee of the city council. He receives no additional compensation as a result of being chairman of the legislative committee but does receive compensation as a city councilman. At the direction of the mayor and city council, such councilman oversees the lobbying activities of city employees and personally acts for the purpose of influencing legislation of concern to the city of which he is a councilman. You state that such councilman alleges that he is not required to register as a lobbyist because he is an "elected state official."

"Lobbyist" is defined in § 105.470.1(3), RSMo. Such definition reads as follows:

(3) 'Lobbyist', any person, including persons employed by or representing federal or state agencies and all political subdivisions thereof, who acts in the course of his employment or who engages himself for pay or for any valuable consideration for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any legislative

The Honorable Thomas J. Brown, III

action by the legislature; or any person who receives any direct or indirect benefits or expenses for lobbying activities, whether by grant or otherwise, from any state, the federal government or any private not for profit foundation or corporation; provided that the term shall not include any member of the general assembly or elected state officer;

It is clear from the definition in § 105.470.1(3) that a person is a "lobbyist" if he is employed by or represents a political subdivision in the course of his employment for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any legislative action by the legislature. We have no doubt that the activities above set out are in the course of employment of the city councilman. It is generally recognized that an office is an employment but that not every employment is an office. This holding was succinctly set forth by the Supreme Court of Colorado, quoting Chief Justice Marshall of the United States Supreme Court in the case of Hudson v. Annear, 75 P. 2d 587 (Colo. 1938), 1.c. 588:

'Although an office is "an employment," it does not follow that every employment is an office.' Chief Justice Marshall, in United States v. Maurice, 2 Brock. 96, 26 Fed.Cas. 1211, 1214, No. 15,747.

While it is true that under repealed provisions of the Missouri Constitution it was held that the phrase "political subdivision" did not include cities insofar as appellate jurisdiction of the Supreme Court of Missouri was concerned, the phrase "political subdivision" is generally held to include cities. The Supreme Court held a city to be a "political subdivision" insofar as the nepotism provision of the Missouri Constitution is concerned in the case of State ex inf. Ellis ex rel. Patterson v. Ferguson, 65 S.W.2d 97 (Mo. 1933). It therefore appears that a councilman represents a political subdivision and is a lobbyist when he represents a city for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any legislative action by the legislature.

The Honorable Thomas J. Brown, III

Elected state officers are exempt from the provisions relating to lobbyists, but it is our view that a city councilman can in no way be considered as an elected state officer but is a city officer. In the case of Coleman v. Kansas City, 182 S.W.2d 74 (Mo. Banc 1944), the contention was made that the office of license collector of Kansas City was a state office. In disposing of this contention, the Supreme Court said at l.c. 77:

Nor is the office of license collector a 'state office' because it is established by a state law. County and city offices generally are so established. The distinction between state and municipal officers rests upon the extent of their powers and the nature of their duties.

Inasmuch as you have stated that the councilman in question oversees the lobbying activities of city employees, and he personally acts in attempting to influence the taking, passage, amendment, delay or defeat of any legislative action by the legislature, he is a "lobbyist" as such term is used in § 105.470.

It is our understanding that the councilman about whom you inquire engages in the activities described in § 105.470.1 (3), quoted supra, on more than an occasional basis and expends more than \$100 during a legislative session. It follows that such a person is not a "witness" as such word is defined in § 105.470.1(4) but is a "lobbyist."

Section 105.470.2 provides as follows:

2. Each lobbyist shall, not later than five days after beginning any activities described in subdivision (3) of subsection 1 of this section, file under oath standardized duplicate registration forms with the chief clerk of the house of representatives and the secretary of the senate. The forms shall include the lobbyist's name and business address, the name and address of the person or persons he employs, the name and address of the person, business, association or governmental agency by whom he is employed or in whose interest he appears or works. The chief clerk of the

The Honorable Thomas J. Brown, III

house and the secretary of the senate shall maintain files on all lobbyists' filings which shall be open to the public. Each lobbyist shall file an updating statement under oath within one week of any addition, deletion, or change in the lobbyist's employment or representation.

Such section provides that the city councilman, who is a "lobbyist," shall not later than five days after beginning any activities described in subdivision (3) of subsection 1 of § 105.470, above quoted, file under oath registration forms with the chief clerk of the house of representatives and the secretary of the senate, and such lobbyist shall file any updating statement under oath within one week of any addition, deletion or change in the lobbyist's employment or representation.

Under § 105.470.4, lobbyists are to file with the chief clerk of the house of representatives and the secretary of the senate on standardized forms at certain prescribed times, the information required in such subsection.

Section 105.470.8 provides as follows:

Any person failing to comply with the provisions of this section is guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or by confinement in the county jail for not more than one year, or both, and shall not be permitted to register as a lobbyist before the general assembly for a period of two years.

Under the provisions of subsection 8, any person who is a "lobbyist" and who fails to file the prescribed forms at the time required by the statutes of this state is guilty of a misdemeanor and upon conviction thereof shall be punished as provided by the statute and shall not be permitted to register as a lobbyist before the general assembly for the period of two years.

As pointed out above, it is our view that a city councilman, who as chairman of the legislative committee of the council of the city oversees the lobbying activity of city employees and acts personally in attempting to influence the taking, passage, amendment, delay or defeat of any legislative action

The Honorable Thomas J. Brown, III

by the legislature is a "lobbyist" and is subject to the provisions of § 105.470. Section 105.470.6, RSMo, places responsibility and discretion regarding prosecution of such offenses in the prosecuting attorney of Cole County.

Finally, we note that the last line of this opinion, as originally issued June 24, 1980, has been amended to read as shown in the preceding sentence. This correction is necessary because the sectional references in § 105.472, RSMo 1978 (as well as in §§ 105.474, 105.476, 105.478 and 105.482) to the extent that they purport to include §§ 105.450 to 105.482 are erroneous. Such references improperly include § 105.470 which was not a part of SSSCSHB 1610, 79th General Assembly, which amended only the laws respecting the regulation of conflicts of interest.

Very truly yours,

JOHN ASHCROFT
Attorney General

August 29, 1980

OPINION LETTER NO. 139
Answer by letter-Lowry

Dr. Arthur L. Mallory
Commissioner
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, MO 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's state plan for the administration of vocational education under the Vocational Education Amendments Act of 1968, as amended.

Our review has taken into consideration the Vocational Educational Act of 1963, P.L. 88-210, as amended; the Vocational Amendments Act of 1968, P.L. 90-576, as amended; the Education Amendments of 1976, P.L. 94-482; the applicable federal regulations; Art. III § 38(a), Art. IV, § 15, and Art. IX, §§ 1(b), 2(a), and 2(b), Mo. Constitution; §§ 161.092, 161.112, 161.122, and 178.430 through 178.580, RSMo 1978.

It is the opinion of this office that:

1. The Missouri State Board of Education is the state agency solely responsible for the administration of vocational education in Missouri and is, therefore, the "State Board" as that term is defined in 20 U.S.C. § 1248(8);
2. The Missouri State Board of Education has the authority under state law to submit a state plan for the administration of vocational education;
3. The Missouri State Board of Education has the authority to administer or supervise the administration of the foregoing state plan;

Dr. Arthur L. Mallory

4. All provisions contained in the foregoing state plan are consistent with state law;

5. All of the provisions of the foregoing state plan can be carried out by the state;

6. The Commissioner of the Missouri Department of Elementary and Secondary Education has been duly authorized by the Missouri State Board of Education to submit the foregoing state plan to the United States Commissioner of Education and to represent the Missouri State Board of Education in all matters relating thereto.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification forms.

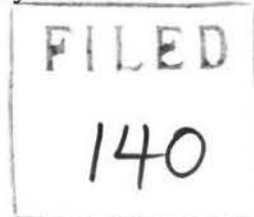
Yours very truly,

JOHN ASHCROFT
Attorney General

August 14, 1980

OPINION LETTER NO. 140
(Answer by Letter-Klaffenbach)

The Honorable Harriett Woods
Senator, 13th District
Room 329, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Woods:

This letter is in response to your questions asking:

Under Chapter 321:

1. Does 321.290 apply only to debts obligated to bonded or contractual debts, or does it apply to any debts, such as operating deficits of fire districts;

can the fire district increase taxes by a vote of the board when they are in debt?

2. Under 321.225, can the fire district use this portion of the tax base for other costs than ambulance service?

3. Can the fire district use pension funds to pay for health insurance for active firemen;

can they use pension funds for any ongoing operating costs?

Your first question asks whether § 321.290, RSMo, applies only to bonded or contractual debts or whether it applies to any debts such as operating deficits of fire districts and whether the fire district can increase taxes by a vote of the board when they are in debt.

The Honorable Harriett Woods

Section 321.290 provides:

Whenever any bonded or contractual indebtedness has been incurred by a district, it shall be lawful for the board to levy taxes and collect revenue for the purpose of creating a reserve fund in such amount as the board may determine, to be used to meet the obligations of the district.

It seems clear that this section refers only to bonded or contractual indebtedness. Whether a particular indebtedness of the district comes under the definition of either "bonded or contractual indebtedness" is largely a factual matter which we cannot determine with the information that we have.

Your second question asks whether under § 321.225, RSMo, the fire district can use that portion of the tax base for costs other than ambulance service.

Section 321.225, RSMo, provides that a fire protection district may, in addition to its other powers and duties, provide emergency ambulance service within its district if a majority of the voters voting thereon approve a proposition to furnish such service and to levy a tax not to exceed fifteen cents on the one hundred dollars assessed valuation "to be used exclusively to supply funds for the operation of an emergency ambulance service." (Emphasis ours.)

Your third question asks whether the fire district may use pension funds to pay for health insurance for active firemen, and whether they can use pension funds for any ongoing operating costs.

We are advised that the fire protection district to which you refer is currently paying out of pension funds the costs of medical coverage for firefighters and the costs of their disability insurance premiums. The district apparently makes these expenditures out of pension funds on the advice of counsel. Therefore, it is our view that the legality of these expenditures can only be determined by a court of law in an action brought by

The Honorable Harriett Woods

interested and proper parties. The question is not, under these circumstances, a proper subject for an opinion of this office.

We enclose Opinion No. 511, dated October 6, 1970, to Cantrell, which is related to your third question and is self-explanatory.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 511,
Cantrell, 10/6/70

June 11, 1980

OPINION LETTER NO. 141
(Answer by Letter-Klaffenbach)

The Honorable Al Nilges
Representative, District 126
Room 413, Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Nilges:

This letter is in response to your questions asking whether a fire protection district organized under Chapter 321, RSMo, may impose a fee for fire fighting services rendered within the district to residents of the district in addition to ad valorem property taxes authorized under that chapter, and whether such a fire protection district may impose a fee to be charged for fire fighting services rendered within the district for nonresidents when such persons do not pay ad valorem property taxes authorized by this chapter.

We know of no authority for the charging of such fees in either case. It is our view that the legislature did not intend that such fees would be charged. This result seems all the more obvious when considered in light of the provisions of § 321.226, RSMo Supp. 1979, which provide that a fire protection district which is authorized to provide emergency ambulance service within its district may provide such emergency ambulance service outside its district and that when providing emergency ambulance service a fire protection district may assess and collect a fee for such service.

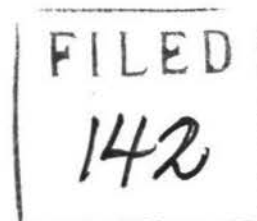
Very truly yours,

JOHN ASHCROFT
Attorney General

June 16, 1980

OPINION LETTER NO. 142
(Answer by Letter-Klaffenbach)

Honorable James R. Strong
Representative, District 119
Room 106, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Strong:

This letter is in response to your questions asking as follows:

- a. Are the records compiled by the investigative staff of the Campaign Finance Review Board 'public records' which must be open to the public for inspection?
- b. Are the votes of the members of the Campaign Finance Review Board to refer or not refer a specific case to a prosecuting attorney for legal action, 'public votes'?
- c. May the members of the Campaign Finance Review Board hold 'closed meetings' and take 'closed votes' in deciding whether or not to refer a specific case to a prosecuting attorney for prosecution?

Subsection 5 of § 130.066, RSMo, provides in pertinent part:

All investigations by the board prior to an election shall be strictly confidential. Revealing any investigation information prior to such an election shall be a violation of this chapter and shall be cause for

Honorable James R. Strong

removal or dismissal of a board member or board employee. Details of all investigations shall be confidential with the exception of notification of the complainant or the person under investigation;

You have also indicated that there is some question as to whether there is a conflict between the above-quoted provisions and the "Sunshine Law", Chapter 610, RSMo. Section 610.015, RSMo, provides:

Except as provided in section 610.025, and except as otherwise provided by law, all public votes shall be recorded, and if a roll call is taken, as to attribute each 'yea' and 'nay' vote, or abstinence if not voting, to the name of the individual member of the public governmental body, and all public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication.

Moreover, § 610.025 provides in pertinent part:

2. Any meeting, record, or vote pertaining to legal actions, causes of action, or litigation involving a public governmental body, . . . may be a closed meeting, closed record, or closed vote.

* * *

5. Other meetings, records or votes as otherwise provided by law may be a closed meeting, closed record, or closed vote.

The Campaign Finance Review Board is created under § 130.061, RSMo. There is no question that this Board is a public governmental body under Chapter 610, RSMo. Under § 130.066, RSMo, the Board is to report apparent violations of the Campaign Finance Disclosure Law to the "appropriate prosecuting attorney."

Honorable James R. Strong

It is clear that under the "Sunshine Law" not all meetings, records or votes are open to the public. Further, we believe that the exception relating to legal actions, causes of action and litigation involving a public governmental body is applicable in this instance. Under § 610.025 the public body may decide to hold a closed meeting, closed record or closed vote. However, § 130.066, which we have quoted in part, clearly prohibits the disclosure of any investigation information prior to the election and it seems quite obvious that any vote or record relative to such investigation is also closed prior to the election. We, therefore, conclude that before the election such investigation records are not public records, the Campaign Finance Review Board must hold closed meetings with respect to such investigations, and the votes of the Board with respect to such investigations are closed votes.

The last sentence of § 130.066.5 makes confidential the "[d]etails of all investigations . . ." except for notification of the complainant or the person under investigation. We assume therefore that the legislature intended to make the details of all investigations confidential after the election, as well as before the election. We believe that it follows that meetings of the Campaign Finance Review Board must be closed after the election, as well as before the election. The votes of the Board members may or may not, as the Board desires, be made public after the election because such votes, in our view, come under the provisions of the Sunshine Law relating to legal actions, causes of action and litigation and not under the confidentiality provisions of § 130.066.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

June 19, 1980

OPINION LETTER NO. 143
(Answer by Letter-Klaffenbach)

The Honorable Estil V. Fretwell
Representative, District 1
RR #2, Box 227
Canton, Missouri 63435

FILED

143

Dear Mr. Fretwell:

This letter is in response to your questions asking:

1. Can a Missouri county or a group of counties pursuant to Section 70.010, RSMo 1978, contract with other political subdivisions to provide a transportation system within their geographical area? See Section 70.220, RSMo 1978.
2. If such a cooperative effort is within the power of such political subdivisions can such a service be coordinated by a Regional Planning Commission pursuant to Section 210.180(4)?
3. Can a regional planning commission pursuant to Section 251.190, RSMo 1978, utilize grants from the federal government and allocations of funds from counties and political subdivisions of this state to coordinate a transportation system for a less than ten (10) county area of the state? See Section 70.010, RSMo 1978.
4. Pursuant to the power granted a regional planning commission by Section 251.300, RSMo 1978, can such a commission contract to provide transportation services in such a region?

The Honorable Estil V. Fretwell

5. Can a Missouri county without a charter form of government utilize county funds to provide transportation services to county residents?

We know of no authority for a Missouri county, not having a charter form of government, to provide for general transportation services for county residents. In the absence of such authority, it is our view that the cooperative agreement sections, §§ 70.010, RSMo, et seq., and §§ 70.210, RSMo, et seq., are not applicable.

We believe that this answers your questions numbered one, two, three, and five.

Your fourth question asks whether a regional planning commission organized under the provisions of §§ 251.150, RSMo, et seq., has authority to provide transportation services pursuant to powers granted the commission by § 251.300, RSMo. Under § 251.300, the functions of the regional planning commission are solely advisory to the local governments and local government officials comprising the particular region. We find no other provisions authorizing such a regional planning commission to contract to provide such transportation services.

Very truly yours,

JOHN ASHCROFT
Attorney General

PROSECUTING ATTORNEY:
ASSISTANT PROSECUTING
ATTORNEYS:

Assistant prosecuting attorneys in first class counties not having a charter form of government may be employed on a part-time basis and may be allowed to engage concurrently in private civil law practice.

June 23, 1980

OPINION NO. 144

The Honorable William J. Hannah
Prosecuting Attorney
St. Charles County
205 North Second Street
St. Charles, Missouri 63301

Dear Mr. Hannah:

This opinion is in response to your request asking:

May Assistant Prosecuting Attorneys in first class counties not having a charter form of government be employed part-time and therefore be able to engage concurrently in private civil practice?

Section 56.067, RSMo, provides:

In counties of the first class not having a charter form of government, the prosecuting attorney shall devote full time to his office, and, except in the performance of his official duties, shall not engage in the practice of law.

Section 56.151, RSMo, provides:

1. The prosecuting attorney of all counties of the first class not having a charter form of government may appoint such assistant prosecuting attorneys, and may employ such investigators and stenographic and clerical help as he deems necessary for the proper discharge of the duties of his office, and may set their compensation within the limits of the allocations made for that purpose by the county court. The compensation for the assistant prosecuting attorneys, investigators and stenographic and clerical help shall be paid

The Honorable William J. Hannah

in equal installments out of the county treasury in the same manner as other county employees are paid.

2. The assistant prosecuting attorneys shall possess the same qualifications and shall be subject to the same fines and penalties for neglect of duty or misdemeanor in office as the prosecuting attorney.

Section 56.360, RSMo, provides:

It shall be unlawful for any prosecuting attorney or circuit attorney, or any assistant prosecuting attorney or any assistant circuit attorney, during the term of office for which he shall have been elected or appointed, to accept employment by any party other than the state of Missouri in any criminal case or proceeding; provided, that nothing in this section shall be deemed to preclude the officers specified in this section from engaging in the civil practice of law. Any violation of the provisions of this section shall be deemed a misdemeanor.

Clearly, § 56.067 prohibits the prosecuting attorney himself in counties of the first class not having a charter form of government from practicing law notwithstanding the provisions of § 56.360. Section 56.151 authorizes the appointment of assistant prosecuting attorneys in counties of the first class not having a charter form of government, and the fixing of their compensation, but does not prohibit the private practice of law by such assistants. Although § 56.151 provides that such assistant prosecuting attorneys shall possess the same qualifications as the prosecuting attorney, we do not view this requirement as prohibiting such assistants from engaging in the private practice of law. Clearly, § 56.360 prohibits such assistants from the private practice of criminal law but authorizes such assistants generally, if there is no other prohibition, to engage in the civil practice of law. Prior to the 1959 amendment of

The Honorable William J. Hannah

§ 56.360, assistant prosecuting attorneys having jurisdiction of criminals within cities of 100,000 inhabitants or more were required to devote their entire time and energy to the discharge of their duties. This was construed to prohibit private practice by such attorneys. By comparison § 56.445, RSMo, which pertains to the office of the circuit attorney of the City of St. Louis provides that such circuit attorney and his assistants and associates devote their entire time and energy to the discharge of their official duties, but that such circuit attorney may in his discretion designate as many as seven of his assistants as provided in § 56.540, RSMo, as special assistant circuit attorneys, who may be allowed to engage in the civil practice of law.

It seems clear that there is no specific prohibition against assistant prosecuting attorneys in counties of the first class not having a charter form of government engaging in the private practice of law except for the quoted provision of § 56.360.

We conclude that assistant prosecuting attorneys in first class counties not having a charter form of government may be employed on a part-time basis and may be allowed to engage concurrently in private civil law practice.

CONCLUSION

It is the opinion of this office that assistant prosecuting attorneys in first class counties not having a charter form of government may be employed on a part-time basis and may concurrently engage in the private practice of civil law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT
Attorney General

JUDGES: A magistrate judge who was elected to a full term in November
ELECTION: of 1978 in Jackson County became an associate circuit judge under
the nonpartisan court plan on January 2, 1979, and is entitled
to serve a full four-year term beginning January 1, 1979, through
December 31, 1982, and therefore does not run for retention in 1980. Associate
circuit judges in St. Louis County who were appointed by the governor after the
general election in 1978 and before January 2, 1979, to fill additional magis-
trate positions or to fill a vacancy under repealed §§ 482.010.3 or 482.020
complete the terms for which they were appointed December 31, 1980, and shall
run for retention at the general election in 1980 for a term of office ending
December 31, 1984. Associate circuit judges who were appointed by the governor
after the general election in 1978 and before January 2, 1979, as additional
magistrates or to fill a vacancy under repealed §§ 482.010.3 or 482.020, in
courts not under the nonpartisan court plan will complete the terms for which
they were appointed December 31, 1980, and the persons elected to such offices
at the November election in 1980 will serve the remainder of the term of the
office ending December 31, 1982.

July 22, 1980

OPINION NO. 145

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This opinion is in response to your questions asking:

1. Should an associate circuit judge who was
elected as a magistrate judge to a full term
in November of 1978 run for retention in 1980?
2. When should an associate circuit judge who was
appointed as a magistrate judge after the Novem-
ber 1978 election but before January 2, 1979
run for retention?

You also state:

Regarding the first question, Judge James E.
May who was elected as magistrate judge in Jack-
son County in 1978, has inquired whether he must
stand for retention in 1980 or 1982. He believes
the Judicial Article is unclear on the issue.

On the second question, several St. Louis
County associate circuit judges who were
appointed to terms in the last two months of
1978 are divided on whether they must stand
for retention this year.

With respect to your first question asking whether an
associate circuit judge, who was elected in Jackson County in
November of 1978, should run for retention in 1980, we
note first of all that Jackson County selected judges under

The Honorable James C. Kirkpatrick

the nonpartisan court plan at the time that § 27 of the schedule of Article V of the Missouri Constitution became effective. Under § 27.9 on January 2, 1979, the judges of the magistrate court in any circuit which selected judges under the nonpartisan selection of judges became nonpartisan judges. Under § 27.8 each judge who became an associate circuit judge on January 2, 1979, in any circuit subject to the provisions of the nonpartisan court plan, became eligible for retention in office as an associate circuit judge by filing in the office of the secretary of state a declaration of candidacy for election not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office. Section 27.4c provides that in 1978 all magistrates be elected as provided by law. It also provides that on the effective date of that constitutional article, January 2, 1979, all magistrates who are then in office become associate circuit judges and serve out the remainder of their terms as such.

When the associate circuit judge was elected magistrate judge in Jackson County in 1978, he took office for a term of four years pursuant to § 482.010, which was repealed as of January 2, 1979, and § 23 of Article V of the Missouri Constitution, which was also repealed at that time. Section 19 of Article V of the Missouri Constitution, which has been effective since January 2, 1979, provides that associate circuit judges have terms of four years.

We believe that it is clear from the above that the associate circuit judge, who was elected as a magistrate judge in Jackson County in 1978, has a term which ends December 31, 1982, and therefore does not run for retention in 1980.

Your next question asks when St. Louis County associate circuit judges, who were appointed magistrate judges after the November 1978 election but before January 2, 1979, should run for retention. It is our understanding that the judges to whom you refer were appointed by the governor pursuant to the provisions of § 482.020, repealed January 2, 1979, to fill a vacancy or pursuant to the provisions of § 482.010, repealed January 2, 1979, which authorized the appointment of additional magistrates to meet the needs of justice. (See also, present § 478.320, RSMo, which provides that in addition to the associate circuit judges authorized, one additional associate judge is authorized for each magistrate appointed pursuant to subsection 3 of § 482.010.)

The Honorable James C. Kirkpatrick

Under § 27.9 of Article V of the Missouri Constitution, which we cited in answer to your first question, it is clear that since St. Louis County judges were under the nonpartisan plan on January 2, 1979, the magistrates in St. Louis County who became associate circuit judges at that time also came under the nonpartisan court plan.

Magistrates appointed as additional magistrates under § 482.010.3, repealed January 2, 1979, were to hold office until the next general election at which time a successor was to be elected "to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates." Similarly, with respect to magistrates who were appointed to fill vacancies, § 482.020, repealed January 2, 1979, provided that the governor fill such vacancies by the appointment of a person "who shall hold his office until the next general election at which a successor shall be elected for the unexpired or the full term as the case may be." Under repealed § 482.010, magistrates were elected for a term of four years beginning at the general election in 1946 and every four years thereafter.

Section 27.8 of Article V of the Missouri Constitution provides that associate circuit judges who came under the nonpartisan court plan under the constitutional amendments shall be eligible for retention in office at the general election next preceding the expiration of their terms of office by making the required filing, and if retained shall, unless removed for cause, remain in office for the number of years after December thirty-first following such election as is provided for the full term "of such office" to be eligible for retention at the end of such term. We interpret this provision to mean in this situation that such judges shall stand for retention at the 1980 November general election which comes before the term to which they were appointed expires, December 31, 1980, to remain if retained for the full term of such office after December 31, 1980.

It is therefore our view that such magistrate judges who were appointed by the governor after the November 1978 election but before January 2, 1979, and became associate circuit judges under the nonpartisan court plan hold office through December 31, 1980, and must stand for retention at the 1980 general election. If retained, they remain in office through December 31, 1984.

The Honorable James C. Kirkpatrick

Finally your office also asked when an associate circuit judge who was appointed as magistrate after the November 1978 general election but before January 2, 1979, in a circuit not under the nonpartisan court plan must run for re-election. We understand that your question refers both to magistrates appointed as additional magistrates or to fill a vacancy.

As we have noted previously, magistrates appointed as additional magistrates under § 482.010.3, repealed January 2, 1979, were to hold office until the next general election at which time a successor was to be elected "to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates." And, similarly, with respect to magistrates who were appointed to fill vacancies, § 482.020, repealed January 2, 1979, provided that the governor fill such vacancy by the appointment of a person "who shall hold his office until the next general election at which a successor shall be elected for the unexpired or the full term as the case may be."

It seems clear that both the judges appointed as additional judges and to fill vacancies were appointed to hold office only until the next general election under repealed §§ 482.010 and 482.020. However, because these sections were repealed, we believe that the provisions of § 105.030, RSMo, became applicable. Section 105.030 then and still provides that a person appointed by the governor, after duly qualifying and entering upon the discharge of his duties under the appointment, shall continue in office until the first Monday in January, next following the first ensuing general election at which general election a person shall be elected to fill the unexpired portion of the term or for the ensuing regular term, as the case may be, and the person so elected shall enter upon the discharge of the duties of the office the first Monday in January next following his election, except that when the term to be filled begins on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold office until such other date. Under former § 482.050, also repealed January 2, 1979, each magistrate took office on the first day of January following his election.

The Honorable James C. Kirkpatrick

It is therefore our view that the terms of such judges expire December 31, 1980.

Section 27.4c of Article V of the Missouri Constitution provides that such judges will serve out their terms, but it does not prohibit the legislature from extending the short term of such judges from the date of the general election through December thirty-first.

We therefore conclude that such associate circuit judges not under the nonpartisan court plan, who were appointed as additional magistrates or to fill a vacancy, have a term ending December 31, 1980. Because there is no constitutional provision (as in the case of nonpartisan court plan judges) which provides that the election in 1980 will be for a full term, the person elected at the election to succeed the person appointed as additional magistrate or to fill a vacancy, will serve for the remainder of the four year term of such office through December 31, 1982.

CONCLUSION

It is the opinion of this office that a magistrate judge who was elected to a full term in November of 1978 in Jackson County became an associate circuit judge under the nonpartisan court plan on January 2, 1979, and is entitled to serve a full four-year term beginning January 1, 1979, through December 31, 1982.

Associate circuit judges in St. Louis County who were appointed by the governor after the general election in 1978 and before January 2, 1979, to fill additional magistrate positions or to fill a vacancy under repealed §§ 482.010.3 or 482.020 complete the terms to which they were appointed December 31, 1980, and may run for retention at the general election in 1980 for a term of office ending December 31, 1984.


Associate circuit judges who were appointed by the governor after the general election in 1978 and before January 2, 1979, as additional magistrates or to fill a vacancy under repealed §§ 482.010.3 or 482.020, in courts not under the nonpartisan court plan will complete the terms for which they were appointed December 31, 1980, and the persons elected to such offices at the

The Honorable James C. Kirkpatrick

November election in 1980 will serve the remainder of the term of the office ending December 31, 1982.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

August 13, 1980

OPINION LETTER NO. 146
(Answer by Letter-Sprague)



David R. Freeman, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65102

Dear Mr. Freeman:

You have requested our legal opinion whether there is any period of time during which a "child care center" and a "family day care home" may legally operate prior to meeting the requirements of Section 210.211, RSMo 1978, and whether operation of such facilities would be illegal if licensed by an entity other than the Division of Family Services of the Department of Social Services.

Your request is to comply with an identical request by the Regional Administrator, Food and Nutrition Service (FNS), United States Department of Agriculture, for an opinion on these questions by the "chief legal officer" of the state, pursuant to Section 226.7(d)(4) of 7 CFR Part 226, the federal regulations governing administration of the "child care food program" (CCFP) of the Department of Agriculture.

Section 226.7(d)(4) sets forth procedures for approval of applications for child care centers and day care homes to participate in the CCFP where such facilities have applied for licensing but have not yet received a determination from the state licensing authority. Where permitted by state law, such facilities may participate in the federal program until they are

David R. Freeman, Director

denied licensure or approval by the state licensing authority, or their participation may be terminated after one year from the date of program approval if they have failed to take action to complete the requirements for licensing.

Section 226.7(d)(4) also provides that state agencies are exempt from implementing the procedures for program participation by facilities which have applied for but not received a state license "when state law mandates that entities of that type secure state licensure as a prerequisite to operation." The section continues: "State agencies seeking this exemption relative to a given type or types of child care entities shall submit for FNS review and approval documentation from the chief State legal officer that the condition for exemption exists within the State regarding the specified type or types."

The Missouri statute which governs the licensing of facilities of the type cited in your request is Section 210.211, RSMo, which provides, in pertinent part:

It shall be unlawful for any person to establish, maintain or operate a boarding home for children, a day care home or day nursery for children, or a child placing agency as defined in Sections 210.201 to 210.245, or to advertise or hold himself out as being able to perform any of the services as defined in Section 210.201, without having in full force and effect a written license therefore granted by the Division of Family Services. . .

The state and federal definitions of child care facilities vary insignificantly for purposes of applying requirements of the federal program to the types of state child care facilities.

Section 210.210(4), RSMo 1978, provides:

"Day care home" or "day nursery" shall be held to mean a house or other place conducted or maintained by any person who advertises or holds himself out as providing care for more than four children during the daytime, for compensation or otherwise, except those operated by a school system or in connection with a business establishment as a convenience for its customers, and except boarding homes for children as defined in Sections 210.201 to 210.245. . .

David R. Freeman, Director

Section 226.2(f) of the federal regulations cited above defines "child care center" as "any public or private nonprofit organization licensed or approved to provide nonresidential child care service to enrolled children, primarily of preschool age, including but not limited to day care centers, settlement houses, neighborhood centers, Head Start centers and organizations providing day care services for handicapped children. . . ."

Section 226.2(j) of the federal regulations defines "day care home" as "an organized nonresidential child care program for children enrolled in a private home licensed or approved as a family or group day care home and under the auspices of a sponsoring organization."

In response to the specific questions raised in your opinion request, it is our legal opinion that:

(a) There is no period of time during which a child care center or a family day care home, which meets the definitional requirements of Section 210.201(4), RSMo 1978, may legally operate prior to meeting the licensure requirements of Section 210.211, RSMo 1978.

(b) Operation of a child care center or day care home which meets the definitional requirements of Section 210.201(4), without obtaining approval from the Division of Family Services of the Missouri Department of Social Services, pursuant to Section 210.211, RSMo 1978, would constitute illegal operation.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

October 29, 1980

OPINION LETTER NO. 148
(Answer by Letter-Allen)



Honorable James F. Antonio
State Auditor
State Capitol Building
Jefferson City, MO 65101

Dear Mr. Antonio:

The following is in response to your opinion request which asked these questions:

1. In a third or fourth class county where the county court has not required the county collector to make daily deposits and the county collector is investing and earning interest on the amounts he collects prior to turning the money over to the county treasurer, to what funds is the interest earned by the collector to be credited, and how is the amount to be credited to each such fund to be determined?
2. In a third or fourth class county where the county court has required the county collector to make daily deposits and the county collector is investing and earning interest on the amounts he collects prior to turning the money over to the county treasurer, to what funds is the interest earned by the collector to be credited and how is the amount to be credited to each such fund to be determined?

In some third and fourth class counties, the county courts have not required the county collectors to make daily deposits.

Honorable James F. Antonio

Consequently, the county collectors are investing and earning the interest on the amounts collected prior to turning the money over to the county treasurers. In some instances, the county courts have required the county collectors to make daily deposits. However, some collectors are investing and earning interest on amounts they collect prior to turning the money over to the county treasurers in such instances.

Section 110.150.2, RSMo 1978, states:

2. The interest upon each fund shall be computed upon the daily balances with the depository, and shall be payable to the county treasurer monthly, who shall place the interest on the school funds to the credit of those funds respectively, the interest on all county hospital funds and hospital district funds to the credit of those funds, the interest on county health center funds to the credit of those funds and the interest on all other funds to the credit of the county general fund.

Recently, in State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532 (Mo. Banc 1979), the Missouri Supreme Court held that § 110.150.2 is applicable to county collectors as well as county treasurers. The court held that a specific statute prevails over a general one. Id. at 536.

This office had occasion to consider a similar subject in Op. No. 110, Keyes, June 3, 1977. However, in light of the Fort Zumwalt case, which was decided two years after that opinion, it is apparent that portions of that opinion are no longer applicable and should be withdrawn.

We, therefore, believe that the Fort Zumwalt case answers both questions asked in your request. Based on that case, it is the view of this office that in third and fourth class counties where the county courts have not required the county collectors to make daily deposits and the collectors are investing and earning interest on the amounts they collect prior to turning the money over to the county treasurers, the interest accrues pursuant to § 110.150.2 and any amount to be credited each such fund is to be determined pursuant to that section. It is our further view that in third and fourth class counties where the county courts have required the county collectors to make daily deposits and the county collectors are investing and earning interest on amounts they collect prior to turning those moneys over to the county treasurers, then § 110.150.2 determines to what fund such interest accrues

Honorable James F. Antonio

and how the amount is to be credited. Op. No. 110, Keyes, June 3, 1977, is withdrawn in part.

Yours very truly,

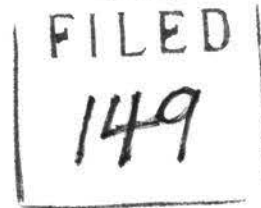
A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

June 27, 1980

OPINION LETTER NO. 149
(Answer by Letter-Klaffenbach)

The Honorable Joe D. Holt
Representative, District 109
Room 309, Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holt:

This letter is in response to your questions asking:

- (1) Does a wholesale fireworks dealer have an obligation to determine for what purposes fireworks purchased from him are to be used?
- (2) If the sale of fireworks by the wholesaler occurs at a time other than between June 20 and July 10 or between December 10 and January 5, must the wholesaler determine
 - (a) whether the buyer has a retail sales tax number?
 - (b) whether the buyer plans to later sell the fireworks at retail? and/or
 - (c) whether the buyer is in fact a wholesale customer or merely a buyer trying to circumvent the provisions against retail purchases of fireworks under section 320.150 RSMo?

Section 320.150, RSMo, provides in pertinent part:

1. No person shall offer fireworks for sale to individuals at retail before the twentieth day of June and after the

The Honorable Joe D. Holt

tenth day of July and before the tenth
day of December and after the fifth day
of January.

. . . .

The sections with respect to fireworks regulation, § 320.-110, RSMo, et seq., do not define "retail sale." However, § 144.010, RSMo Supp. 1979, of the sales tax law defines "sale at retail" as a transfer of tangible personal property to a purchaser for use and consumption and not for resale in any form for a valuable consideration.

We believe that it is clear that it is the obligation of the wholesaler to determine that the sales are not made to individuals at retail before the 20th day of June and after the 10th day of July and before the 10th day of December and after the 5th day of January.

It seems clear that such a wholesaler would be well advised to determine whether the purchaser has a retail sales license under § 144.083, RSMo, and that he should require the purchaser to furnish an exemption certificate under § 144.210, RSMo. In addition, it would probably further protect the seller if he would require the purchaser to complete a form, although such is not required by law, by which the buyer would state his understanding of the provisions of § 320.150, and the fact that his purchase was indeed a bona fide purchase as a retail seller and in compliance with § 320.150.

The suggestions we have set out here are not express requirements of §§ 320.110, RSMo, et seq., but are what we believe to be precautions which such a wholesale seller of fireworks should take to show that he has attempted to comply with § 320.150. We do not purport to speculate as to what instructions a court would give the jury in the trial of the issues which might arise in a case involving a claimed violation of § 320.150.

Very truly yours,

JOHN ASHCROFT
Attorney General

August 1, 1980

OPINION LETTER NO. 150
(Answer by Letter-Klaffenbach)

The Honorable Robert H. House
Prosecuting Attorney
Douglas County Courthouse
Ava, Missouri 65608

FILED
150

Dear Mr. House:

This letter is in response to your question asking:

May the Circuit Court Judge or the County Court in my third class county appoint my wife (who is also my law partner) as assistant prosecutor, special prosecutor or special counsel without pay for the prosecution of child support and Title IV-D cases only? If the appointment is proper, could such appointment be a blanket appointment to handle IV-D cases until rescinded by the court, or must it be on a case by case basis? The reason for the appointment is my lack of time to adequately pursue such IV-D cases.

The cases to which you refer are brought pursuant to the provisions of § 207.025, RSMo. Subsection 6 of that section provides for the appointment of a special prosecutor by the governor on a case to case basis, where the prosecuting attorney states that he does not intend to take the action required by that section. However, the appointment of a special prosecutor under subsection 6 of § 207.025 would not solve your problem.

In addition, it is our view that § 56.110, RSMo, relative to the appointment of a special prosecuting attorney by the court does not apply because the express provisions of that section authorize the court having criminal jurisdiction to

The Honorable Robert H. House

appoint some other attorney to prosecute the case only apply where the prosecuting attorney and assistant prosecuting attorney are interested or have been employed as counsel in any case where such employment is inconsistent with the duties of his office or shall be related to the defendant in any criminal prosecution, either by blood or marriage.

Further, it is our view that § 56.250, RSMo, with respect to the appointment of special counsel by the county court, is not applicable because such special counsel may only be employed to represent the county in prosecuting a suit brought by the county. We do not believe that the cases to which you refer fall in this category. This seems especially evident in view of the explicit language of § 207.025, relative to the duties of the prosecuting attorney and the provisions, which we have noted, for the appointment of a special prosecutor in those cases.

We also point out that it should be clear that you cannot name your wife as assistant prosecutor, even without pay, because § 6 of Article VII of the Missouri Constitution, which prohibits nepotism, applies in such a situation even though the wife receives no compensation. In this respect we enclose Opinion No. 13, dated May 15, 1953, to Charles V. Butler, which is self-explanatory.

We thus conclude that we know of no way for your wife to be appointed, either as special counsel or as a special prosecutor, to handle such cases in the situation you present.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal line extending to the right.

JOHN ASHCROFT
Attorney General

Enclosure:
Att'y Gen. Op. No. 13,
Butler, 5/15/53

STATE FIRE MARSHAL:
PUBLIC RECORDS:

Section 320.235, RSMo
1978, permits the State
Fire Marshal to release
investigatory statements,
testimony and reports to

the public, provided that such statements, testimony and
reports are not required to be kept confidential by any
state or federal law.

October 22, 1980

OPINION NO. 152

Mr. F. M. Wilson, Director
Missouri Department of Public Safety
621 E. Capitol
Jefferson City, Missouri 65101

Dear Mr. Wilson:

This opinion is in response to your question asking the
following:

[Under § 320.235, RSMo 1978], is it legal for the State
Fire Marshal to release confidential investigation
reports to agencies which are not involved in law
enforcement, such as fire departments and insurance
companies.

Section 320.235, RSMo 1978, states as follows:

"From the reports made to him, the state fire
marshal shall keep a record of fire losses occurring in
this state and of facts concerning them. He shall make
the compilations, investigations and statistical summaries
he deems proper, all of which shall be kept as permanent
records in his office. All records shall be public,
except that the state fire marshal may, in his discretion,
withhold from the public, statements and testimony taken
in an investigation or examination, correspondence
relating to an investigation or examination, confidential
reports of private persons and agents, and reports of
investigations of fire losses, but any records withheld
as herein provided shall be available to the prosecutor
of the county in which the fire loss occurred" (emphasis
supplied).

As stated in State v. Kraus, 530 S.W.2d 684 (Mo. banc 1975),
"[t]he primary rule of statutory construction is to ascertain
the intent of the lawmakers from language used, to give

effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." (Citations omitted). Id. at 685. In the present case, the statute in question states in clear terms that the withholding of investigatory statements, testimony and reports from the public is optional and discretionary with the State Fire Marshal, except that such information must always be made available to the prosecutor of the county in which the fire loss occurred. A necessary implication from this statutory language is that the State Fire Marshal is legally entitled to make all of the described material available to the public if he deems this to be appropriate.

The sole possible exception to the above conclusion is implicitly contained in the term "confidential reports" as used in the statute. If the term "confidential" as used therein is deemed to refer to a mere hope or expectation by the supplier of the information that this information shall not be made public, there would be appear to be no legal impediment to the dissemination of this information by the State Fire Marshal. This would not be the case, however, with regard to information required to be kept confidential by some other state or federal law. Some of the state and federal confidentiality statutes which might pertain to records kept by the State Fire Marshal are §§ 610.100 to 610.115, RSMo 1978 (arrest records); § 211.321, RSMo 1978 (juvenile arrest and court records); 21 U.S.C. § 1175 (drug abuse treatment records); and 42 U.S.C. § 4582 (alcoholism treatment records). Where statutes specifically require that certain records or information be kept confidential, it is the view of this office that these statutes must be given effect over any general implication which might be drawn from § 320.235 that such information or records could be disclosed to the public. See State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536 (Mo. banc 1979).

It is important to emphasize that the fact that the State Fire Marshal may legally disclose investigative records does not signify that he is free of possible civil liability resulting from the contents of those records, and nothing in this opinion is intended to indicate otherwise. Thus, for example, if records released by the State Fire Marshal were to contain false and libelous statements, it is the view of this office that § 320.235 would not in itself preclude a judgment against the Fire Marshal.

CONCLUSION

It is the opinion of this office that § 320.235, RSMo 1978, permits the State Fire Marshal to release investigatory statements, testimony and reports to the public, provided that such statements, testimony and reports are not required to be kept confidential by any state or federal law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John M. Morris.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John Ashcroft".

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 5, 1983

Addendum to
OPINION NO. 153 (1980)

The Honorable Samuel C. Jones
Chairman
State Tax Commission
Post Office Box 146
Jefferson City, Missouri 65102

Dear Mr. Jones:

Section 53.010, RSMo Supp. 1982, created the office of county assessor in each county having township organization. Accordingly, the last holding in our Opinion No. 153 (1980) is no longer correct and should be disregarded. Such opinion is hereby modified to express our view that counties having township organization now have county assessors and thus come within the provisions of Senate Bill No. 679, 80th General Assembly.

Very truly yours,



JOHN ASHCROFT
Attorney General

ASSESSMENTS: The funds designated by Senate Bill No. 679, § 2,
ASSESSORS: 80th General Assembly, are not in lieu of the
twenty-five percent funding for reassessment provided by § 137.750.2(3), RSMo Supp. 1980, and these funds may be spent for both general reassessment purposes and for ongoing assessment costs. Further, the county court need not approve expenditure of all money collected under Senate Bill No. 679, § 2. Finally, counties under township organization do not come within the provisions of Senate Bill No. 679 so that the present means of funding the costs of the assessment functions in these counties is not changed.

November 7, 1980

OPINION NO. 153

The Honorable Dennis K. Hoffert
Chairman, State Tax Commission
623 East Capitol Avenue
Post Office Box 146
Jefferson City, Missouri 65102



Dear Mr. Hoffert:

This is in response to your request for an opinion concerning the interpretation of Senate Bill No. 679, 80th General Assembly, which was approved by the Governor on May 30, 1980, and became effective August 13, 1980. Specifically, you asked the following questions:

1. S.B. 679, § 2 refers to assessment fund required under § 137.750, RSMo. Are the funds earmarked by S.B. 679, § 2 in lieu of the 25% funding of equalization provided by § 137.750.2(3)?
2. May funds earmarked by S.B. 679, § 2 be spent for general reassessment purposes, for ongoing assessors' costs, or for both?
3. Clearly, the funds earmarked by S.B. 679, § 2 may be expended only for assessment purposes. However, may the county court approve expenditure of less than all monies so provided, or must the county court approve expenditure of all monies so provided?
4. How shall township counties allocate among the townships monies earmarked by S.B. 679, § 2?

The Honorable Dennis K. Hoffert

Senate Bill No. 679, 80th General Assembly (which is now found in §§ 137.715, 137.720 and 137.725, RSMo Supp. 1980), provides:

Section 1. Each county assessor shall, subject to the approval of the governing body of the county, appoint the additional clerks and deputies that he or she deems necessary for the prompt and proper discharge of the duties of his office. A portion of the salaries of the clerks and deputies hired by each county assessor shall be paid by the state in accordance with sections 137.710 and 137.750, RSMo, and the remainder of the salaries for such clerks and deputies shall be paid by the county in which they are employed.

Section 2. A percentage of all ad valorem property tax collections allocable to each taxing authority within the county shall be deducted from the collections of taxes each year and shall be deposited into the assessment fund of the county as required under section 137.750, RSMo. The percentage shall be one-half of one percent for all counties of the first and second class and cities not within a county and one percent for counties of the third and fourth class. The county shall bill any taxing authority collecting its own taxes. The county may also provide additional moneys for the fund. Every county shall provide all moneys necessary to assure that the fund is at least equal to the amount of moneys available for assessment purposes in the previous year. Any amount which is attributable to deductions under this section remaining in the fund each year after payment of all costs shall be paid to the taxing authority.

Section 3. The salary of the assessor, the clerks, deputies, employees and all costs and expenses of the assessor shall be paid monthly by the county from the assessment fund established under section 137.750, RSMo.

The Honorable Dennis K. Hoffert

It appears that the legislature intended Senate Bill No. 679 to establish a source of funding for expenses, costs and salaries attributable to each county assessor. The act clearly does not specifically repeal any existing legislation. Therefore, if Senate Bill No. 679, § 2, replaces the provisions of § 137.750.2(3), RSMo Supp. 1980, it must do so by implication. It is a well established principle of statutory construction that a statute is impliedly repealed by the passage of a subsequent statute only where the provisions of the latter are irreconcilably inconsistent with the prior statute. State v. Ludwig, 322 S.W.2d 841, 848 (Mo. banc 1959). This situation is not presented by the statutes in question.

Section 137.750, RSMo Supp. 1980, deals specifically with general reassessment ordered by a court or by the State Tax Commission. Section 137.750.2 provides for reimbursement to a county by the state and political subdivisions within the county of a specified percentage of the cost of an ordered reassessment. The county is to be reimbursed by the state for 50 percent of all reasonable costs incurred pursuant to an approved reassessment plan, and an additional 25 percent for those expenditures specified in § 137.750.2(4). The total reimbursement from the state is not to exceed 75 percent of actual cost or \$30 per parcel. Section 137.750.2(3), RSMo Supp. 1980, requires all taxing jurisdictions within the county to reimburse the county for 25 percent of those costs specified in subdivision four. The source of the reimbursement funds is to be ad valorem property tax collections. Section 137.750.3, RSMo Supp. 1980, provides that a county seeking reimbursement, either for those ongoing costs authorized under Chapter 137, RSMo, or for reassessment costs authorized under § 137.750, RSMo, must establish a fund to be used exclusively for funding such costs. Senate Bill No. 679, § 2, calls for each taxing jurisdiction within the county to contribute from 1/2 to 1 percent of its annual ad valorem property tax collections to the fund established under § 137.750. The legislature's failure to specify that the county is also to deduct this amount from its property tax collections, as was done under § 137.750.2(3), and the fact that Senate Bill No. 679 provides that the county may provide additional moneys for the fund and must do so to the extent necessary to assure that the amount in the fund is at least equal to the amount of moneys available in the previous year, indicates that the county was not meant to be subject to the deduction required under this section. Finally, § 3 provides that all costs, expenses and salaries of the assessor's office are to be paid from this fund.

The Honorable Dennis K. Hoffert

Reading these provisions together, it becomes apparent that there is no inconsistency between § 137.750.2(3), RSMo Supp. 1980, and Senate Bill No. 679. Section 137.750.2(3) provides the source of funding of certain specified costs and expenses attributable to an approved reassessment plan. Senate Bill No. 679 establishes a source of funding in addition to that provided in § 137.750.2(3). As made clear by Senate Bill No. 679, § 3, the moneys collected under Senate Bill No. 679, § 2, and deposited in the fund of § 137.750 are to be for all costs, expenses and salaries of the county assessor's office. This would necessarily include those costs attributable to reassessment which do not fall within the categories enumerated in subdivision (4) of § 137.750, RSMo, as well as the general ongoing expenses of the assessor's office.

Therefore, in response to questions one and two, it is our opinion that the funds designated by Senate Bill No. 679, § 2, are not in lieu of the 25 percent funding provided by § 137.750.2(3), RSMo Supp. 1980, but are in addition to such funding. It is also our opinion that the legislature intended Senate Bill No. 679 funds to be expended for both general reassessment purposes not otherwise covered under § 137.750.2(4), RSMo Supp. 1980, and for all ongoing costs of the county assessor's office.

Senate Bill No. 679, § 2, provides that "[a]ny amount which is attributable to deductions under this section remaining in the fund each year after payment of all costs shall be paid to the taxing authority." This provision makes it clear that all the moneys collected from the taxing authorities need not be spent during a given year. The legislature specifically required that any funds deducted, but not needed to pay the expenses of the county assessor's office, were to be returned to the respective tax authorities.

Your final question concerns how township counties are to allocate the moneys designated by Senate Bill No. 679, § 2. We are of the opinion that such counties do not come within the Act. Counties under township organization do not have a county assessor. Instead, the assessment functions are performed by the ex officio township assessors in each township within the county. Chapters 53 and 65, RSMo. A review of Senate Bill No. 679 shows that it specifically refers to county assessors, but contains no reference to township assessors. In fact, Senate

The Honorable Dennis K. Hoffert

Bill No. 679, as enacted by the legislature, is entitled "AN ACT Relating to county assessors in all counties." It is well established in Missouri that the title of an act is a legislative expression of its general scope, and that the title may be considered in determining the intent of the legislature. Hurley v. Eidson, 258 S.W.2d 607 (Mo. banc 1953). Applying this principle to Senate Bill No. 679, it appears that the legislature expressly limited the operation of the act to county assessors, and, therefore, to those counties which are not under township organization.

The limited scope of Senate Bill No. 679, as reflected by its title, and by the lack of any reference to township assessors in its text, becomes even more apparent when compared to other statutes pertaining to assessment and reassessment. Section 137.750.3, RSMo Supp. 1980, which establishes the fund referred to in Senate Bill No. 679, makes specific references to "township assessors." The same is true for § 137.700, RSMo Supp. 1980, which provides for payment by the state of a portion of all costs and expenses of the "assessor of each county . . . and of the ex officio township assessor . . .", and § 137.710, RSMo Supp. 1980, which provides for payment of a portion of the assessor's salary and a portion of the fees of the ex officio township assessors. This demonstrates the legislature's awareness of the distinction between township counties and nontownship counties, and further evidences the intent that the provisions of Senate Bill No. 679 are not meant to apply to counties having township organization.

CONCLUSION

It is the opinion of this office that the funds designated by Senate Bill No. 679, § 2, 80th General Assembly, are not in lieu of the 25 percent funding for reassessment provided by § 137.750.2(3), RSMo Supp. 1980, and that these funds may be spent for both general reassessment purposes and for ongoing assessment costs. Further, the county court need not approve expenditure of all money collected under Senate Bill No. 679, § 2. Finally, counties under township organization do not come within the provisions of Senate Bill No. 679 so that the present means of funding the costs of the assessment functions in these counties is not changed.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

CRIMINAL LAW
DIVISION OF CORRECTIONS
PRISONERS

Under § 589.040, RSMo Supp. 1980, the Director of the Division of Corrections is to include, in the rehabilitation program for sexual assault offenders, all inmates who are presently serving sentences for sexual assault offenses, whether the imprisonment began prior or subsequent to the effective date of § 589.040, RSMo Supp. 1980.

November 17, 1980



Mr. David R. Freeman, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

OPINION NO. 154

Der Mr. Freeman:

This opinion is issued in response to your request concerning the following question:

"Does the following language contained in CCSHCS House Bill Nos. 1138, 1279, 1461, 1534, 1592 and 1634 [§ 589.040, RSMo Supp. 1980], 'the Director of the Division of Corrections shall develop a program of treatment, education and rehabilitation for all persons who are serving sentences for sexual offenses' and 'all persons imprisoned by the Division of Corrections for sexual assault offenses shall be required to participate in the program developed pursuant to subsection 6.1' include all inmates incarcerated in the Division of Corrections or only those incarcerated after the effective date of this Bill?"

Section 589.040, RSMo 1980 Supp., reads as follows:

"1. The director of the division of corrections shall develop a program of

treatment, education and rehabilitation for all prisoners who are serving sentences for sexual assault offenses. When developing such programs, the ultimate goal shall be the prevention of future sexual assaults by the participants in such programs, and the director shall utilize those concepts, services, programs, projects, facilities and other resources designed to achieve this goal.

"2. All persons imprisoned by the division of corrections for sexual assault offenses shall be required to participate in the program developed pursuant to subsection 1 of this section."

The language of § 589.040 seems to be clear and unambiguous. When the language of a statute is clear and unambiguous, the plain and ordinary meaning of that language reflects the legislative intent. State ex rel. Zoological Park Subdistrict of City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975). Subsection 2 of § 589.040, RSMo 1980 Supp., is clear in its indication that all persons imprisoned for sexual offenses shall be required to participate in the programs. Further, it is clear from subsection 1 of § 589.040 that the ultimate goal of this statute is to prevent future sexual assaults. This statute, considered in light of the conditions existing at the time of its enactment and its stated purpose, State v. Wright, 515 S.W.2d 421 (Mo. banc 1974), in our opinion, leads to the conclusion that all persons imprisoned for sexual assaults, whether such imprisonment began before or after the effective date of § 589.040, RSMo Supp. 1980, should be included in the program developed by the Director of the Division of Corrections for prisoners who are serving sentences for sexual assault offenses.

Since the programs envisioned by this statute are rehabilitative and not punitive in nature, it is the opinion of this office that it is not violative of an inmate's rights to require him to participate in this rehabilitative program, even though his imprisonment began prior to the effective date of the statute.

CONCLUSION

It is the opinion of this office that, under § 589.040, RSMo Supp. 1980, the Director of the Division of Corrections is to include, in the rehabilitative program for sexual assault

offenders, all inmates who are serving sentences for sexual assault offenses, whether the imprisonment began prior or subsequent to the effective date of § 589.040, RSMo Supp. 1980.

This opinion, which I hereby approve, was prepared by my assistant, Michael Elbein.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

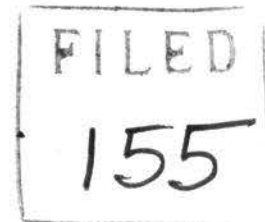
JOHN ASHCROFT
Attorney General

COUNTY COLLECTORS: A second class county collector is not entitled to retain any of the fees collected under § 151.280, RSMo.

July 23, 1980
Amended August 12, 1980

OPINION NO. 155

The Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County Courthouse
Fulton, Missouri 65251



Dear Mr. Hamilton:

This opinion is in response to your question asking whether the county collector in a second class county is entitled to the fees set out in § 151.280, RSMo, as well as his normal salary.

Section 52.420, RSMo, provides:

1. The county collector in all counties of the second class shall receive, as compensation for his services, an annual salary of thirteen thousand five hundred dollars.

2. The salary shall be in lieu of all fees, commissions, penalties, charges and other compensation now charged, received or allowed by virtue of any statute, to any such collector as compensation for his services except the compensation provided by subsection 3 of this section.

3. In all counties of the second class in which the county collector has entered into a contract with a constitutional charter city providing for the collection of municipal taxes by the collector, the collector shall be paid as compensation for the additional duties an annual salary of three thousand dollars, during the period in which the contract is effective, payable out of the county treasury.

The Honorable C. E. Hamilton, Jr.

Section 151.280, RSMo, provides:

The county collector shall be allowed for collecting the railroad taxes, payable out of the same, one percent on all sums paid without seizure of personal property; and on all collections made by seizure of personal property, he shall be allowed five percent on the amount, which shall be taxed or charged as costs and paid by the railroad company; and on all collections made by suit against such company or companies two percent on the amount, to be paid as costs by the defendant; provided, that in all counties of class one and the city of St. Louis the collector shall pay such fees into the county or city treasury as provided by law.

In our Opinion No. 67, dated May 5, 1955, to Norton, this office concluded that in fixing the salary provided in § 52.420, due consideration was given to all of the then existing fees, commissions, penalties, charges and compensation of every nature previously received by collectors of the revenue in counties of the second class and that the all inclusive phraseology employed in the statute discloses a legislative intent that no other compensation in any form may be received by such officers. We have not enclosed a copy of that opinion because it is not otherwise applicable here.

We note that the provisions of § 52.420 basically originated in the Laws of 1931, p. 290, whereas the provisions of § 151.280, with respect to such fees, were already in existence prior to the enactment of such laws in 1931.

We believe that it is clear that the legislature did not intend that the county collectors in second class counties retain any of the fees collected under § 151.280, RSMo.

The collector must collect fees under § 151.280 on behalf of the county and must pay such fees into the county treasury.

Finally, it should be noted that § 52.420 no longer provides the full compensation of such collectors. See, for example, § 52.435, RSMo, and § 52.285, RSMo Supp. 1979, which were both enacted after § 52.420 was enacted and which both provide additional compensation for such collectors.

The Honorable C. E. Hamilton, Jr.

CONCLUSION

It is the opinion of this office that a second class county collector is not entitled to retain any of the fees collected under § 151.280, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", followed by a horizontal line.

JOHN ASHCROFT
Attorney General

ELECTIONS:
CANDIDATES:

A candidate committee formed for a prior election and still in existence is required to make a disclosure report of expenditures and contributions under

§ 130.041, RSMo, if it has made any expenditures or received any contributions since its last required disclosure report without regard to the amount spent or received unless the treasurer of such committee properly files a notarized statement under oath pursuant to § 130.046, RSMo Supp. 1979, with the appropriate officer stating that neither the aggregate amount of contributions received nor the aggregate amount of expenditures made by the committee during the reporting period exceeded one hundred dollars. A candidate with an existing candidate committee which has made expenditures or received contributions since its last required disclosure report for a previous election is not eligible to file an exemption statement under § 130.016, RSMo Supp. 1979. When neither the candidate nor the candidate committee has received contributions or made expenditures since the last required disclosure report, the candidate is eligible to file an exemption statement under § 130.016, RSMo Supp. 1979. Expenditures made by a candidate committee since its last required disclosure report for a previous election are reportable expenditures for the candidate's next election.

July 18, 1980

OPINION NO. 156

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building, Room 209
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is in response to your questions asking for an interpretation of certain provisions of the campaign finance disclosure law.

Your first question asks whether a candidate who has had a candidate committee in a prior campaign is eligible for the exemption in § 130.016, RSMo Supp. 1979, if that committee has made expenditures since the filing of its last disclosure report for the past election. Your second question asks whether such a candidate committee is required to file its disclosure reports for the current election if it and the candidate have received and made and intend to receive and make \$500 or less in total contributions and expenditures and have received and intend to receive \$50 or less from any single contributor from the time of filing its last report through the current election. Your third question asks whether all expenditures which are made by such a candidate committee such as charitable donations, political travel expenses and so forth which are apparently not directly related to any specific election are reportable expenditures of the committee.

The Honorable James C. Kirkpatrick

Section 130.016, RSMo Supp. 1979, provides in pertinent part:

1. No candidate shall be required to comply with the requirements to file a statement of organization or disclosure reports of contributions and expenditures for any election in which neither the aggregate contributions received nor the aggregate expenditures made on behalf of such candidate exceed five hundred dollars and no single contributor, other than the candidate, has contributed more than fifty dollars of the aggregate contributions received, provided that:

(1) The candidate files a sworn exemption statement with the appropriate officer that he does not intend to either receive contributions or make expenditures in the aggregate of more than five hundred dollars or receive contributions from any single contributor, other than himself, that aggregate more than fifty dollars and that the total of all contributions received or expenditures made by him and all committees or any other person with his knowledge and consent in support of his candidacy will not exceed five hundred dollars and that the aggregate of contributions received from any one contributor will not exceed fifty dollars. . . .

Section 130.041, RSMo, provides in pertinent part:

1. Every committee which is required to file a statement of organization, including a candidate who has elected to serve as his own candidate committee, shall file a legibly printed or typed disclosure report of receipts and expenditures for any election for which the committee makes expenditures or contributions or for which the committee receives contributions with the intent to make expenditures or contributions. . . .

Subsection 4(2) of § 130.046, RSMo Supp. 1979, provides:

No disclosure report need be filed by the treasurer of any committee if by the closing date for the report the committee has neither received contributions nor made expenditures in the aggregate in excess of one hundred dollars since the closing date of the previously filed disclosure report and if the treasurer files under oath a notarized statement with the appropriate officer stating that neither the aggregate amount of contributions received nor the aggregate amount of expenditures made by

The Honorable James C. Kirkpatrick

the committee during the reporting period exceeded one hundred dollars. Any contributions received or expenditures made which are not reported because this statement is filed in lieu of a disclosure report, must be included in the next disclosure report filed by the committee. This statement shall not be filed in lieu of two or more consecutive reports if either the contributions received or expenditures made in the aggregate during those reporting periods exceed one hundred dollars. This statement may not be filed in lieu of the report required to be filed not later than the thirtieth day after an election if that report would show a deficit in excess of five hundred dollars.

Under § 130.021, RSMo Supp. 1979, after a candidate committee is formed all contributions on hand and all further contributions received by such candidate and any of the candidate's own funds to be used in support of his candidacy must be deposited in a candidate committee depository account established pursuant to subsection 4 of § 130.021, RSMo Supp. 1979, and all expenditures must be made through the treasurer of the candidate committee. Under § 130.041, RSMo, every committee which is required to file a statement of organization (see § 130.021.5), including a candidate who has elected to serve as his own candidate committee, is required to file a disclosure report of receipts and expenditures for any election for which the committee makes expenditures or contributions or for which the committee receives contributions with the intent to make expenditures or contributions. However, under subsection 4(2) of § 130.046, RSMo Supp. 1979, no disclosure report need be filed by the treasurer of the committee if by the closing date for the report the committee has neither received contributions nor made expenditures in the aggregate in excess of one hundred dollars since the closing date of the previously filed disclosure report and if the treasurer files the required notarized statement under oath.

It seems clear that a candidate who has an existing candidate committee (for termination of such committee see subsection 8 of § 130.021) is not eligible to file an exemption statement under § 130.016, RSMo Supp. 1979, if either the candidate or the candidate committee has received contributions or made expenditures since its last required disclosure report. When neither the candidate nor candidate committee have received contributions or made expenditures since the last required disclosure report, the candidate is eligible to file an exemption statement under § 130.016, RSMo Supp. 1979.

We are also of the view, in answer to your last question, that expenditures made by a candidate committee after its last report for the previous election such as charitable donations and political

The Honorable James C. Kirkpatrick

travel expenses even though apparently not directly related to a specific election are reportable expenditures for the next election in which the individual is a candidate. Such candidate committees by definition exist to make expenditures on behalf of the candidates candidacy. Subsection 6 of § 130.011, RSMo Supp. 1979.

CONCLUSION

It is the opinion of this office that a candidate committee formed for a prior election and still in existence is required to make a disclosure report of expenditures and contributions under § 130.041, RSMo, if it has made any expenditures or received any contributions since its last required disclosure report without regard to the amount spent or received unless the treasurer of such committee properly files a notarized statement under oath pursuant to § 130.046, RSMo Supp. 1979, with the appropriate officer stating that neither the aggregate amount of contributions received nor the aggregate amount of expenditures made by the committee during the reporting period exceeded one hundred dollars. A candidate with an existing candidate committee which has made expenditures or received contributions since its last required disclosure report for a previous election is not eligible to file an exemption statement under § 130.016, RSMo Supp. 1979. When neither the candidate nor the candidate committee has received contributions or made expenditures since the last required disclosure report, the candidate is eligible to file an exemption statement under § 130.016, RSMo Supp. 1979. Expenditures made by a candidate committee since its last required disclosure report for a previous election are reportable expenditures for the candidate's next election.

The foregoing opinion which I hereby approve was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN ASHCROFT
Attorney General

CITIES, TOWNS & VILLAGES: A municipality coming within the provisions of §§ 590.100 to 590.150, RSMo,
CITY COURTS: may impose a \$2.00 court fee for peace
COURT COSTS: officer training under § 590.140, RSMo,
in addition to the maximum court costs
provided under § 479.260, RSMo.

July 31, 1980

OPINION NO. 159

The Honorable E. J. "Lucky" Cantrell
Representative, 74th District
3406 Airway
Overland, Missouri 63114

FILED

159

Dear Mr. Cantrell:

This opinion is in response to your questions asking:

1. May a municipality impose a \$2.00 court fee for peace officer training pursuant to section 590.140 RSMo in addition to the \$12.00 court fee allowed for municipalities pursuant to section 479.260 RSMo?
2. Or, must the \$2.00 court fee for peace officer training be part of the total \$12.00 fee allowed by section 479.260?

It should be clear that only certain cities may assess the \$2.00 court fee provided in § 590.140, RSMo.

Section 590.150, RSMo, provides:

The provisions of sections 590.100 to 590.150 shall not apply to a political subdivision or a municipality having a population of less than two thousand persons or which does not have at least four full-time nonelected paid peace officers; provided, however, the governing body of the political subdivision or municipality may by order or ordinance elect to come under the provisions of sections 590.100 to 590.150 or such election may be later rescinded and, provided further, that upon election to come under the provisions of 590.100 to 590.150 the political subdivision or municipality shall be entitled to the fees authorized under sections 590.100 to 590.150, otherwise, such fees shall not be collected as a part of defendant's costs.

The Honorable E. J. Cantrell

Section 590.140, RSMo, provides:

1. A fee of up to two dollars may be assessed as costs in each court proceeding filed in any court in the state for violations of the general criminal laws of the state, including infractions, or violations of county or municipal ordinances, provided that no such fee shall be collected for nonmoving traffic violations, and no such fee shall be collected for violations of fish and game regulations, and no such fee shall be collected in any proceeding in any court when the proceeding or defendant has been dismissed by the court. For violations of the general criminal laws of the state or county ordinances, no such fee shall be collected unless it is authorized by the county government where the violation occurred. For violations of municipal ordinances, no such fee shall be collected unless it is authorized by the municipal government where the violation occurred. Such fees shall be collected by the official of each respective court responsible for collecting court costs and fines and shall be transmitted monthly to the treasurer of the county where the violation occurred in the case of violations of the general criminal laws of the state or county ordinances and to the treasurer of the municipality where the violation occurred in the case of violations of municipal ordinances.

2. Each county and municipality may use funds received under this section only to pay for the training required as provided in sections 590.100 to 590.150, provided that any excess funds not needed to pay for such training may be used to pay for additional training for peace officers or for training for other law enforcement officers employed or appointed by the county or municipality.

The Honorable E. J. Cantrell

Section 479.260, RSMo, provides in pertinent part:

1. Municipalities by ordinance may provide for court costs in an amount not to exceed twelve dollars per case for each municipal ordinance violation case filed before a municipal judge, and in the event a defendant pleads guilty or is found guilty, the judge may assess costs against the defendant except in those cases where the defendant is found by the judge to be indigent and unable to pay the costs. The costs authorized in this subsection are in addition to service costs, witness fees and jail costs that may otherwise be authorized to be assessed, but are in lieu of other court or judge costs or fees. Such costs shall be collected by the municipal clerk and disbursed as provided in subsection 1 of section 479.080.

2. In municipal ordinance violation cases which are filed before an associate circuit judge, court costs shall be assessed in the amount of ten dollars per case. In the event a defendant pleads guilty or is found guilty, the judge shall assess costs against the defendant except in those cases where the defendant is found by the judge to be indigent and unable to pay the costs. In the event a defendant is acquitted or the case is dismissed, the judge shall not assess costs against the municipality. The costs authorized in this subsection are in addition to service costs, witness fees and jail costs that may otherwise be authorized to be assessed, but are in lieu of other court costs. Such court costs shall be collected by the division clerk or as provided by court rule and disbursed as provided in subsection 2 of section 479.080.

Section 479.260 was enacted as a part of House Bill No. 1634, 79th General Assembly, which was the Court Reform and Revision Act of 1978. Such section became effective January 2, 1979, at the same time that the majority of the numerous provisions contained in the Court Reform and Revision Act became effective.

The Honorable E. J. Cantrell

Section 590.140 was enacted as a part of HCSHB Nos. 879 and 899, 79th General Assembly, effective August 13, 1978.

As we have noted, both of these sections were enacted at the same session of the legislature. The main reason for the later effective date of § 479.260 was because it was a part of the Court Reform and Revision Act. Since our primary purpose in interpreting such provisions is to reach the intent of the legislature, it is our view, considering the fact that § 590.140 earmarks the \$2.00 fee for a particular purpose, that it should be considered separate and apart from either the \$12.00 or the \$10.00 maximums provided in § 479.260.

It is our understanding that the conclusion we reach is consistent with the interpretation given such sections by individuals who were instrumental in drafting the Court Reform and Revision Act, and we believe is consistent with the intent of the legislature.

CONCLUSION

It is the opinion of this office that a municipality coming within the provisions of §§ 590.100 to 590.150, RSMo, may impose a \$2.00 court fee for peace officer training under §590.-140, RSMo, in addition to the maximum court costs provided under § 479.260, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

September 11, 1980

OPINION LETTER NO. 162

The Honorable Gary E. Stevenson
Prosecuting Attorney
St. Francois County
Courthouse, Third Floor
Farmington, Missouri 63640

Dear Mr. Stevenson:

This official opinion is issued in response to your inquiry which asks whether Chapter 306, RSMo, may be enforced by a prosecuting attorney in regard to a privately owned lake development, whose association owns such development, adopts the regulations found in Chapter 306, and incorporates them in its bylaws.

Section 306.010 provides definitions for the terms used in Chapter 306. Section 306.010(7), RSMo Supp. 1979, defines "waters of the state" in the following manner:

[A]ny waters within the territorial limits of this state and lakes constructed or maintained by the United States Army Corps of Engineers except bodies of water owned by a person, corporation, association, partnership, municipality or other political subdivision, . . .

Chapter 306 therefore does not apply to a lake owned by a private development.

The question then becomes whether a prosecuting attorney can enforce Chapter 306 in relation to a privately owned body of water,

The Honorable Gary E. Stevenson

if the provisions of Chapter 306 are incorporated in an associations' bylaws. A corporation's shareholders or board of directors is empowered by statute to adopt bylaws not inconsistent with law or the articles of incorporation. Section 351.290, RSMo 1978. A corporation's bylaws are not under the Revised Statutes of Missouri, given the force and effect of law, however.

Therefore, a prosecuting attorney cannot enforce Chapter 306 in regard to bodies of water owned by privately owned lake developments.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

1980

OPINION LETTER NO. 164
(Answer by Letter-Lowry)

Honorable Truman E. Wilson
State Senator, District 34
P. O. Box 113, Fairleigh Station
St. Joseph, MO 64506



Dear Senator Wilson:

This official Attorney General's opinion letter is issued in response to your request for a ruling on the following question:

Does Section 160.051, RSMo 1969, authorize the St. Joseph Board of Education to establish an entrance age of five before September 1 for kindergarten youngsters and an age of six before September 1 for the enrollment of youngsters in grade one?

The questions you pose are essentially the same as the questions answered by this office in Op. No. 394A, Moore, Sept. 25, 1970. A copy of this opinion is included for your reference.

Based on the rationale of Opinion No. 394A, which we here reaffirm, it is clearly impermissible for a school district to prohibit children whose sixth birthday falls between September 1 and October 1 from entering the first grade of school. Any rule which so provides is illegal and void.

It follows, then, that it would also be impermissible for a school district to promulgate a rule which prohibited children whose fifth birthday falls between September 1 and October 1 from entering kindergarten, if kindergarten is provided. The result of such a rule would be either to (a) eliminate children whose birthdays fall between September 1 and October 1 from entering kindergarten at all or (b) forcing them to attend kindergarten twice. Either result is indefensible.

Honorable Truman E. Wilson

It is our view that a school district may not establish an entrance age of five before September 1 for kindergarten youngsters and an age of six before September 1 for first grade youngsters.

Yours very truly,

A handwritten signature in cursive script, reading "John Ahscroft". The signature is written in dark ink and is positioned above the typed name and title.

JOHN AHSCROFT
Attorney General

Enclosure: Op. No. 394A
Moore, 9-25-70



Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

August 11, 1980

OPINION LETTER NO. 165
(Answer by Letter-Otto)

Honorable Richard M. Webster
Senator, 32nd District
Room 434, State Capitol
Jefferson City, Missouri 65101

FILED

165

Dear Senator Webster:

This letter is in answer to your opinion request of recent date reading as follows:

Does a Missouri county recorder of deeds face any criminal liability pursuant to Section 451.060 RSMo 1978 for failing to insist that the certificates required by Section 451.050 RSMo 1978 be presented as a condition precedent to issuance of a marriage license even though Section 451.050 has been repealed?

Senate Bill No. 532 of the 80th General Assembly reads as follows:

AN ACT To repeal section 451.050, RSMo 1978, relating to serological syphilis testing as a requirement for obtaining a marriage license.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Section 451.050, RSMo 1978 is repealed.

Such bill was approved by the Governor June 17, 1980.

Under provisions of Section 29 of Article III of the Constitution of Missouri Section 451.050, RSMo 1978, is repealed as of August 13, 1980. Since that section is repealed as of August 13, 1980, it becomes as of that date nonexistent, of no validity and in contemplation of law it is as if Section 451.050, RSMo 1978 had never existed. It

Honorable Richard M. Webster

is a complete and absolute nullity.

Section 451.060, RSMo provides as follows:

Any recorder of deeds who shall unlawfully issue a license to marry to any person who fails to present and file the certificates provided for in section 451.050; or any physician who shall knowingly and willfully make any false statement in such certificate; or any person applying for a license to marry who shall knowingly and willfully make any false statement in or concerning the said certificates; or any person making the laboratory tests who shall knowingly and willfully make any false statement in the laboratory report; or any person or persons having knowledge of any matter relating to or pertaining to the examination who shall disclose the same, or any portion thereof, upon conviction thereof shall be deemed guilty of a misdemeanor and punished as such.

The provisions of Section 451.060 relating to "the certificates provided for in Section 451.050" are a complete and absolute nullity inasmuch as there is no Section 451.050, RSMo in existence as of August 13, 1980. It follows therefore that any provision in such section relating to any recorder who shall unlawfully issue a license to marry a person who fails to present and file the certificates provided for in Section 451.050 is meaningless. As a matter of law there can be no violation provided relating to lack of certificates provided for in Section 451.050 as of August 13, 1980, because there is no such section in legal existence as of that date.

It is therefore our view that, as of August 13, 1980, recorders of deeds have no authority or duty to require that persons applying for marriage licenses present and file the certificates provided for in Section 451.050, RSMo 1978.

Very truly yours,



JOHN ASHCROFT
Attorney General

SHERIFFS:
COMPENSATION:

Money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special commissioner in partition sales should be paid to the county treasury.

August 22, 1980

OPINION NOS. 166, 167, 168 and 169

The Honorable Stanley B. Cox
Prosecuting Attorney
Pettis County Courthouse
Sedalia, Missouri 65301

Dear Mr. Cox:

This opinion is in response to four separate opinion requests that you have made which we have consolidated here asking whether the sheriff of a second class county may retain certain fees.

With respect to all your questions, we note that § 57.380, RSMo, provides:

The sheriff in all counties of the second class shall charge, collect and receive, on behalf of the county, every fee, penalty, charge, commission and other money that accrues to him or his office for official services rendered in civil and criminal matters, by virtue of any statute of this state, and all the fees, penalties, charges, commissions, and other money collected by him, shall at the end of each month be paid by him to the county treasurer, as provided in section 50.360, RSMo. He is not entitled to collect the per diem allowed to the sheriff as a member of the board of equalization and board of appeals, as provided in section 138.020, RSMo.

And, § 57.340, RSMo, provides:

In all counties of the second class, the sheriff shall receive as compensation for his official services rendered in connection with civil matters, a salary of six thousand dollars per annum. This annual compensation shall be paid to the sheriff in lieu of all fees, commissions,

The Honorable Stanley B. Cox

penalties, charges and other money due to or receivable by him or his office from any source for official services rendered by him in connection with civil matters by virtue of any statute of this state.

Your first question asks:

In a county of second-class which contains less than 100,000 inhabitants, is the compensation of the Sheriff derived from copy costs of offense reports, due the Treasurer of the county under Section 57.380.

It is our understanding that such copies are made on a photocopy machine owned by Pettis County, and that the sheriff uses the sheriff's department manpower in making the photocopies. In answering your first question, we will first set out the legal authority which must be considered in making determinations with respect to the first and subsequent questions that you pose.

In our Opinion No. 92, dated August 4, 1953, to Vogel, this office concluded that the county is entitled to money collected by the recorder under color of office and authority. We enclose a copy of that opinion, which is self-explanatory.

In Yuma County v. Wisener, 46 P.2d 115 (Ariz. 1935), the Supreme Court of Arizona held that a county could recover from a superior court clerk sums collected by the clerk as a charge for unnecessary special marriage certificates, which the clerk induced nonresident applicants to believe was required by law on the ground that the clerk obtained the money under color of office and as a fee. In Nueces County v. Currington, 162 S.W.2d 687 (Tex.Com.App. 1942), it was held by the court that a fee which was paid to a public official for performance of a statutory duty was collected by the official in his official capacity. In the court's opinion, it was stated that unless a fee is provided by law for an official service required to be performed, and the amount thereof fixed by law, none can lawfully be charged therefor. The court, however, also stated that it does not follow that a county whose official collects a fee wrongfully, but under color of office, is not entitled to have the same deposited and paid over in the same manner as is required for the disposition of fees rightfully collected.

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And, in Thomas v. Williford, 534 S.W.2d 2 (Ark. 1976), the Arkansas Supreme Court held, with dissents filed, that funds gratuitously paid by a racing corporation to a county sheriff were not funds to which the county was entitled and were not public funds for which a sheriff could be charged, and receipt by the sheriff of such funds was not in violation of the constitutional provision limiting county officers' salaries, fees and perquisites to a fixed sum per annum. In that case, the court also held that the receipt by the sheriff of a monthly expense check over and above the statutory salary and payment of all traveling expenses without proof that such checks constituted reimbursement for reasonable and necessary expenses incurred in the performance of official duties was illegal, and the sheriff was properly required to account for and repay all such sums received which were not barred by the statute of limitations.

In light of the above authorities, we believe that the answer to your first question, with respect to the money received from making photocopies, is that such money has been received under color of office and should be paid to the county.

Your second question asks:

In a county of the second-class which contains less than 100,000 inhabitants, is the compensation of a Sheriff derived from the service of eviction papers, due the treasurer of the county under Section 57.380, Revised Statutes of Missouri, 1978.

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The eviction papers to which you refer are merely private eviction notices. You also state with respect to your second question that the sheriff does not purport to be serving these papers under any statute and that it is your belief that the sheriff does not use on-duty personnel, nor does he charge the county for expenses in the service of these papers. Apparently, the sheriff and his deputies use their own vehicles for such service and do not charge mileage to the county.

It is our view under the authorities cited with respect to your first question that the sheriff does not receive these moneys by virtue of his office or under color of his office, and therefore, he does not have to pay such money to the county.

Your third question asks:

Is the Sheriff of a second-class county, having a population less than 100,000 inhabitants, obligated to pay to the County Treasurer of said county under Section 57.380, RSMo, 1978, those funds derived from service of summonses and other process from other counties other than his own.

Under § 506.170, RSMo, all process may be served anywhere within the territorial limits of the state and may be forwarded to the sheriff of any county for the purpose of service. It thus appears that the sheriff receives such money as part of his official duties, and therefore, must pay such money to the county.

Your last question asks:

In a county of the second class which contains less than 100,000 inhabitants, is the compensation of the sheriff who has been appointed as a special commissioner for a partition sale, pursuant to Section 528.580 Revised Statutes of Missouri, owed to the Treasurer of said county under provisions of Section 57.380 Revised Statutes of Missouri, 1978.

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Under § 528.580, RSMo, every special commissioner appointed under the provisions of Chapter 528 performs the same duties and with like effect as are enjoined by Chapter 528 upon sheriffs, and in the performance of said duties is governed by the same rules applicable to sheriffs in like cases and receives a compensation for his services as may be in each case fixed by the court.

We enclose a copy of our Opinion No. 32, dated January 13, 1975, to the state auditor, in which this office concluded that sheriffs in third and fourth class counties may not be appointed as special commissioners pursuant to § 528.540, relating to partitions. In that opinion we stated that we felt that § 528.580, speaking in terms of duties "enjoined" upon sheriffs, indicates that these duties are placed primarily upon the sheriffs. And, we stated, as a corollary, we feel that ordinarily a special commissioner is appointed only when a sheriff is, for some reason, unable to perform these duties. We therefore stated that it was our view that if a sheriff is able to and does conduct a partition sale, he does so in his official capacity, and the provisions as to the limit and disposition of fees for the performance of this duty apply.

Although the sheriff apparently has acted in this case as a special commissioner and received the fees fixed by the court, it is our view that the sheriff has the duty to act under the law. He thus should not profit by his failure to perform the duties required of him by law by acting as special commissioner. Accordingly, it is our view that the money received by the sheriff for acting as special commissioner should be paid to the county.

CONCLUSION

It is the opinion of this office that money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special commissioner in partition sales should be paid to the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

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OPINION NOS. 166, 167, 168 and 169

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CONCLUSION

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The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

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CONCLUSION

It is the opinion of this office that money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special commissioner in partition sales should be paid to the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

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It is our understanding that such copies are made on a photocopy machine owned by Pettis County, and that the sheriff uses the sheriff's department manpower in making the photocopies. In answering your first question, we will first set out the legal authority which must be considered in making determinations with respect to the first and subsequent questions that you pose.

In our Opinion No. 92, dated August 4, 1953, to Vogel, this office concluded that the county is entitled to money collected by the recorder under color of office and authority. We enclose a copy of that opinion, which is self-explanatory.

In Yuma County v. Wisener, 46 P.2d 115 (Ariz. 1935), the Supreme Court of Arizona held that a county could recover from a superior court clerk sums collected by the clerk as a charge for unnecessary special marriage certificates, which the clerk induced nonresident applicants to believe was required by law on the ground that the clerk obtained the money under color of office and as a fee. In Nueces County v. Currington, 162 S.W.2d 687 (Tex.Com.App. 1942), it was held by the court that a fee which was paid to a public official for performance of a statutory duty was collected by the official in his official capacity. In the court's opinion, it was stated that unless a fee is provided by law for an official service required to be performed, and the amount thereof fixed by law, none can lawfully be charged therefor. The court, however, also stated that it does not follow that a county whose official collects a fee wrongfully, but under color of office, is not entitled to have the same deposited and paid over in the same manner as is required for the disposition of fees rightfully collected.

The Honorable Stanley B. Cox

In Webster County, Ky. v. Nance, 362 S.W.2d 723 (Ky.Ct.App. 1962), the Kentucky Court of Appeals concluded that the county was entitled to recover all illegal fees collected by the justice of the peace in traffic cases. In Parker v. Laws, 460 S.W.2d 337 (Ark. 1970), the Arkansas Supreme Court held that the proper remedy on determining that illegal court fees have been received by a deputy prosecuting attorney was to require that the fees collected be retained in the registry of the chancery court until the rightful owners had a reasonable notice and an opportunity to assert their claims; thereafter, any unclaimed balance would be paid over to the county. In Maryland Casualty Company v. McCormack, 488 S.W.2d 347 (Ky.Ct.App. 1972), the appellate court held that where a duly appointed administrator of decedent's estate pretended to have authority, as administrator, to exchange for cash a certificate of deposit which was owned solely by decedent's wife, the administrator's actions constituted "color of his office" within the meaning of the bond guaranteeing proper distribution of any money and effects which come to him by color of his office.

And, in Thomas v. Williford, 534 S.W.2d 2 (Ark. 1976), the Arkansas Supreme Court held, with dissents filed, that funds gratuitously paid by a racing corporation to a county sheriff were not funds to which the county was entitled and were not public funds for which a sheriff could be charged, and receipt by the sheriff of such funds was not in violation of the constitutional provision limiting county officers' salaries, fees and perquisites to a fixed sum per annum. In that case, the court also held that the receipt by the sheriff of a monthly expense check over and above the statutory salary and payment of all traveling expenses without proof that such checks constituted reimbursement for reasonable and necessary expenses incurred in the performance of official duties was illegal, and the sheriff was properly required to account for and repay all such sums received which were not barred by the statute of limitations.

In light of the above authorities, we believe that the answer to your first question, with respect to the money received from making photocopies, is that such money has been received under color of office and should be paid to the county.

Your second question asks:

In a county of the second-class which contains less than 100,000 inhabitants, is the compensation of a Sheriff derived from the service of eviction papers, due the treasurer of the county under Section 57.380, Revised Statutes of Missouri, 1978.

The Honorable Stanley B. Cox

The eviction papers to which you refer are merely private eviction notices. You also state with respect to your second question that the sheriff does not purport to be serving these papers under any statute and that it is your belief that the sheriff does not use on-duty personnel, nor does he charge the county for expenses in the service of these papers. Apparently, the sheriff and his deputies use their own vehicles for such service and do not charge mileage to the county.

It is our view under the authorities cited with respect to your first question that the sheriff does not receive these moneys by virtue of his office or under color of his office, and therefore, he does not have to pay such money to the county.

Your third question asks:

Is the Sheriff of a second-class county, having a population less than 100,000 inhabitants, obligated to pay to the County Treasurer of said county under Section 57.380, RSMo, 1978, those funds derived from service of summonses and other process from other counties other than his own.

Under § 506.170, RSMo, all process may be served anywhere within the territorial limits of the state and may be forwarded to the sheriff of any county for the purpose of service. It thus appears that the sheriff receives such money as part of his official duties, and therefore, must pay such money to the county.

Your last question asks:

In a county of the second class which contains less than 100,000 inhabitants, is the compensation of the sheriff who has been appointed as a special commissioner for a partition sale, pursuant to Section 528.580 Revised Statutes of Missouri, owed to the Treasurer of said county under provisions of Section 57.380 Revised Statutes of Missouri, 1978.

The Honorable Stanley B. Cox

Under § 528.580, RSMo, every special commissioner appointed under the provisions of Chapter 528 performs the same duties and with like effect as are enjoined by Chapter 528 upon sheriffs, and in the performance of said duties is governed by the same rules applicable to sheriffs in like cases and receives a compensation for his services as may be in each case fixed by the court.

We enclose a copy of our Opinion No. 32, dated January 13, 1975, to the state auditor, in which this office concluded that sheriffs in third and fourth class counties may not be appointed as special commissioners pursuant to § 528.540, relating to partitions. In that opinion we stated that we felt that § 528.580, speaking in terms of duties "enjoined" upon sheriffs, indicates that these duties are placed primarily upon the sheriffs. And, we stated, as a corollary, we feel that ordinarily a special commissioner is appointed only when a sheriff is, for some reason, unable to perform these duties. We therefore stated that it was our view that if a sheriff is able to and does conduct a partition sale, he does so in his official capacity, and the provisions as to the limit and disposition of fees for the performance of this duty apply.

Although the sheriff apparently has acted in this case as a special commissioner and received the fees fixed by the court, it is our view that the sheriff has the duty to act under the law. He thus should not profit by his failure to perform the duties required of him by law by acting as special commissioner. Accordingly, it is our view that the money received by the sheriff for acting as special commissioner should be paid to the county.

CONCLUSION

It is the opinion of this office that money the sheriff of a second class county receives for copying offense reports, serving process from other counties, and acting as a special commissioner in partition sales should be paid to the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures:

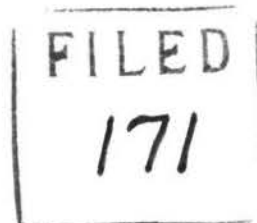
Att'y Gen. Op. No. 92,
Vogel, 8/4/53
Att'y Gen. Op. No. 32,
Ashcroft, 1/13/75

CART: Interest earned by a county on money which the county
INTEREST: receives from the County Aid Road Trust Fund should
COUNTY FUNDS: be credited to the county road and bridge fund and
not to the county general revenue fund.

August 15, 1980

OPINION NO. 171

The Honorable James F. Antonio
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Antonio:

This opinion is in response to your question asking:

To what fund is the interest earned by
a county on money which the county re-
ceives from the County Aid Road Trust
Fund to be credited?

You have also stated that there is no uniformity in the
counties regarding the crediting of the interest in that some
counties credit the interest to the general revenue fund and
others credit the interest to the road and bridge fund.

You have called our attention to subsection 2 of § 110.150,
RSMo, which provides:

The interest upon each fund shall
be computed upon the daily balances with
the depository, and shall be payable to
the county treasurer monthly, who shall
place the interest on the school funds
to the credit of those funds respective-
ly, the interest on all county hospital
funds and hospital district funds to the
credit of those funds, the interest on
county health center funds to the credit
of those funds and the interest on all
other funds to the credit of the county
general fund.

The Honorable James F. Antonio

You have also called our attention to § 231.441, RSMo, which provides:

1. All moneys received by a county from the county aid road trust fund shall be used within the county solely for the construction, reconstruction, maintenance and repairs of roads, bridges and highways as the county court shall direct. The county court shall formulate by written regulations, rules and policies for the use of such funds which shall be kept on file by the county recorder for public inspection. The state highway commission shall have no authority to promulgate rules and regulations concerning the expenditure of such funds and all such rules and regulations heretofore promulgated shall be null and void.

2. The state treasurer by the tenth day of each month shall remit to the county treasurer of each county its allocated share of the county aid road trust fund.

Subsection 1(1) of § 30(a), Art. IV, of the Constitution of Missouri, provides in pertinent part:

The funds credited to each county shall be used by the county solely for the construction, reconstruction, maintenance and repairs of roads, bridges and highways, and subject to such other provisions and restrictions as provided by law. . . .

In State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973), the Missouri Supreme Court stated at l.c. 125:

It is clear, however, that the people of Missouri, by Article IV, Section 30(b), and the General Assembly, by its enactment of Section 226.220, supra, in interpretation

The Honorable James F. Antonio

of Article IV, Section 30(b), intended that no money be diverted from the state road fund and no other use be permitted of the fund except for the enumerated state highway purposes. Pohl v. State Highway Commission, 431 S.W.2d 99, 104-105, 106 (Mo. banc 1968). With the state road fund so restricted against transfer or use for any other purpose, interest or income from such fund must be credited to that fund under Article IV, Section 15, and held against withdrawal or use for any purpose other than state highway purposes, including diversion to the general revenue fund.

While the court referred to § 30(b) of Art. IV and the state road fund, we believe that the same conclusion follows with respect to the County Aid Road Trust Fund under § 30(a) of Art. IV.

It is therefore our view that it would be improper to credit such interest to the general revenue fund of the county notwithstanding the provisions of subsection 2 of § 110.150. The interest from the funds which are paid to the county should be used only for the purposes authorized by § 30(a) of Art. IV and therefore should be paid into the county road and bridge fund.

CONCLUSION

It is the opinion of this office that interest earned by a county on money which the county receives from the County Aid Road Trust Fund should be credited to the county road and bridge fund and not to the county general revenue fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

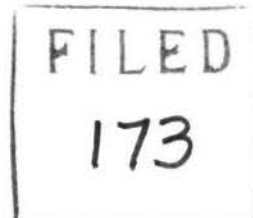
JOHN ASHCROFT
Attorney General

POLICE: Municipal police officers do not have the
ARRESTS: power to arrest ordinance violators outside
CITY POLICE: the limits of the municipality, except when
DEPUTY SHERIFFS: the officer is in "hot pursuit" of the violator and is an officer of the municipality in a first class county having a charter form of government or is an officer of a constitutional charter city which provides for such an exception, and, furthermore, municipal police officers holding a valid deputy sheriff's commission do not have power to arrest ordinance violators outside the municipal limits.

December 19, 1980

OPINION NO. 173

The Honorable Roger Wilson
State Senator, 19th District
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Wilson:

This opinion is in response to your request:

- 1) Is an arrest which is made outside the city limits by a city police officer for violation of a city ordinance a lawful arrest?
- 2) If the arrest in question is unlawful, would the same arrest be lawful if the city police officer held a commission as a deputy sheriff?

The facts giving rise to these issues, as you outlined them, were:

A city police officer, who also carries a deputy sheriff's commission for the county in which the city is located, stops an individual for violation of a city speed limit ordinance. The stop is made outside the city limits. The officer is paid solely by the city, receives no compensation by the county, and is

The Honorable Roger Wilson

not acting upon official county business at the time of the arrest, but is acting for the sole purpose of issuing to the individual a citation for violation of a city ordinance.

In answer to your first question, we refer you to Opinion No. 265, issued October 19, 1967, to James Millan, in which we concluded that police officers of third class cities do not have authority to arrest violators of city ordinances outside the city limits. That opinion was based on City of Advance ex rel. Henley v. Maryland Casualty Company, 302 S.W.2d 28 (Mo. 1957) and Rodgers v. Schroeder, 220 Mo.App. 575, 287 S.W. 861 (1926). Also see Opinion No. 411, issued October 6, 1970, to Gus Salley, concerning officers of fourth class cities. The principles of law explained in these opinions and cases would apply to all classes of cities.

Section 544.157, RSMo 1978, provides for an exception to this rule in permitting a municipal police officer to arrest an ordinance violator outside municipal boundaries if the municipality is in a first class county having a charter form of government and the officer is in "hot pursuit" of the violator. This exception applies to no other class of counties; however, Art. VI, § 19(a), Mo. Const. 1945, provides:

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Accordingly, any city adopting a charter could enact the same exception.

Concerning your second question relating to the authority of a deputy sheriff to arrest an ordinance violator, § 57.270, RSMo 1978, provides that "[e]very deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff." Hence, resolution of the issue depends upon a determination of whether a sheriff has the authority to arrest a violator of a municipal ordinance.

The Honorable Roger Wilson

Two statutes outline a sheriff's duties. Section 57.100, RSMo 1978, provides:

Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by circuit and associate circuit judges.

Section 57.110, RSMo 1978, further provides:

Every sheriff is a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to be committed to jail in case of failure to give the recognizance. The sheriff shall certify the recognizance to the clerk of the circuit clerk.

These statutes do not grant a sheriff authority to enforce municipal ordinances.

It is well settled in Missouri that prosecution for violation of a city ordinance is a civil action. Although its primary object is to punish, a prosecution for its violation is civil in form, despite its resemblance to a criminal action in its effects and consequences. City of St. Louis v. Penrod, 332 S.W.2d 34 (Mo.App., St.L. 1960); also see City of Webster Groves v. Quick, 319 S.W.2d 543 (Mo. 1959). Therefore, because of its reference only to apprehension of "felons," § 57.100 does not grant a sheriff authority to arrest for municipal ordinance violations.

Nor does the provision of § 57.110 that every sheriff shall bring into court "all offenders against law" include municipal ordinances. The Missouri Supreme Court distinguished municipal ordinances from public law in City of Kansas City v. Clark, 68 Mo. 588 (1878):

Nor do we regard the violation of the ordinance under consideration as a crime, since 'a crime * * is an act committed in violation of a public law;' 4 Black. Com.,

The Honorable Roger Wilson

5; a law co-extensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pursuance of, in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty. (Emphasis in original.) Id. at 589-590.

Hence, the reference of § 57.110 to "law" would not include a municipal ordinance. As a consequence, Missouri statutes do not grant a sheriff authority to arrest violators of municipal ordinances.

CONCLUSION

It is, therefore, the opinion of this office that municipal police officers do not have the power to arrest ordinance violators outside the limits of the municipality, except when the officer is in "hot pursuit" of the violator and is an officer of a municipality in a first class county having a charter form of government or is an officer of a constitutional charter city which provides for such an exception, and, furthermore, municipal police officers holding a valid deputy sheriff's commission do not have power to arrest ordinance violators outside the municipal limits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul M. Spinden.

Very truly yours,



JOHN ASHCROFT
Attorney General

Encs: Atty. Gen. Op. No. 265
Millan, 10/19/67
Atty. Gen. Op. No. 411
Salley, 10/6/70

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

July 30, 1980

(Answer by Letter-Turnbull)

Paul R. Ahr, Ph.D., M.P.A.
Director, Department of Mental
Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

FILED

174

Dear Dr. Ahr:

My staff has reviewed the Missouri Department of Mental Health Consolidated Plan for fiscal years 1981 through 1983.

I understand that the Consolidated Plan will be submitted in lieu of separate state plans required by the Drug Abuse Prevention Program, P.L. 92-255, as amended; the Alcohol Formula Grant Program, P.L. 91-616, as amended; the Community Mental Health Centers-Comprehensive Services-Support Program, P.L. 94-63, as amended, and the Developmental Disabilities Basic Support Program, P.L. 95-602.

It is the opinion of this office that, under state law, the Department of Mental Health has the authority to prepare and administer the Consolidated Plan in conformity with the requirements of each of the above-cited programs.

I commend you and your staff for completing this special project designed to reduce unnecessary duplication in the various plan requirements.

Very truly yours,



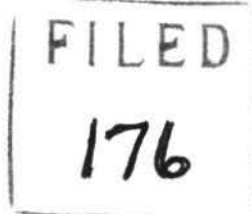
JOHN ASHCROFT
Attorney General

JA:RHT:lw

August 29, 1980

OPINION LETTER NO. 176
(Answer by Letter-Klaffenbach)

The Honorable Joe Moseley
Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201



Dear Mr. Moseley:

This letter is in response to your questions asking:

1. Under the provisions of Section 115.123 R.S.Mo, and Columbia City Charter, Section 137, could the City Council call an election date other than those set forth in Section 115.123 R.S.Mo.? In other words, does City Charter, Section 137, set forth an election date sufficient to meet Section 115.-123's requirement of ' . . . as otherwise expressly provided by city or county charter'?
2. Could such an election be held October 7, 1980 in conjunction with or on the school levy election date?

It is our understanding that you refer to a recall petition which concerns the mayor of the city of Columbia, whose term we are advised ends on April 8, 1981. We have no other information regarding the sufficiency or filing of the petition, and we address ourselves only to the question presented with respect to an interpretation of § 115.123, as amended by Senate Bill No. 734, 80th General Assembly, presently effective.

The Honorable Joe Moseley

Section 115.123, RSMo, provides:

1. All public elections shall be held on Tuesday. Except bond elections necessitated by fire, vandalism or natural disaster, except elections for which ownership of real property is required by law for voting, except special elections to fill vacancies and to decide tie votes or election contests, and except as otherwise expressly provided by city or county charter, all public elections shall be held on the general election day, the primary election day, the municipal primary day, municipal general election day, the first Tuesday after the first Monday in February or March, April, June, August, or November or with an election on another day expressly provided by city or county charter. The election authority of each county shall make the selection of either the February or March election date, but not both dates for the same political subdivision or special district. After January 1, 1978, no city or county shall adopt a charter or charter amendment which calls an election on any day other than the February or March, April, June, August, or November election days specified in this section.

2. Notwithstanding the provisions of subsection 1 of this section, school districts may hold special levy elections on the first Tuesday after the first Monday in October.

Section 137 of the Columbia City Charter provides:

When a sufficient petition has been filed, the city clerk shall submit the same to the council without delay, and the council shall fix a date for holding the election, not less than thirty nor more than forty-five days thereafter. If such office becomes vacant prior to the election, such election shall be cancelled, and the vacancy shall be provided in Section 9 of this charter.

The Honorable Joe Moseley

Section 140 of the Charter of the City of Columbia provides:

No officer shall be subject to recall within six months after his induction into office, nor during the last six months of his term. If he is retained in office by any recall election, he shall not be subject to recall within a period of six months thereafter.

We assume such charter provisions were adopted prior to January 1, 1978.

It is obvious from the provisions that we have that such charter does not set a specific day for such a recall election.

We believe that it is arguable that the city charter provisions, which do not set an express day but require the city council to set a day for the recall election within a certain time frame, would come within the provisions of § 115.123, relating to an election on another day expressly provided for by city charter. However, it is our view that the provisions of that section are sufficiently clear to require a contrary conclusion from this office. That is, § 115.123 allows the setting of an election on another day expressly provided by city charter prior to January 1, 1978. Even assuming that the charter provision was in effect before January 1, 1978, it appears that the statutory provision can only be reasonably interpreted to mean that such a charter provision would have to refer to the precise date on which the election is to be held, and that if the charter did not refer to an express day for the election to be held, it would have to be held on one of the days provided for such elections under § 115.123. If because of the date on which the petition is presented the election cannot be held on a day consistent with the requirements of the charter and of § 115.123, such election cannot be held.

In answer to your second question it is clear that the October election only refers to school district special levy elections.

Finally, we note that § 19(a) of Art. VI of the Missouri Constitution, which authorizes a city to adopt a charter for its own government, provides that such a city shall have all powers which the General Assembly of the State of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Thus, there is no doubt that the legislature may constitutionally deny or limit the powers of a charter city.

The Honorable Joe Moseley

We are aware that this interpretation may, in some instances, severely limit the recall authority given by such city charter. We regret that we must reach this result. However, it seems obvious from the provisions of § 115.123 that such a result would follow without question insofar as such charter provisions are concerned which might be adopted after January 1, 1978. Such a sweeping prohibition indicates in our view that the legislature was not concerned with the fact that it prohibits charter cities from adopting election days after January 1, 1978, which are contrary to those provided in the statute. It seems to follow that there would be no justification for giving the provisions in question of § 115.123 a broad interpretation which would be seemingly contrary to the express language, which we have noted, merely in order to reach a conclusion which would preserve such charter powers in their entirety.

Very truly yours,

JOHN ASHCROFT
Attorney General

MISSOURI STATE EMPLOYEES'
RETIREMENT SYSTEM:
PENSION:
RETIREMENT:

1. A refund of accumulated contributions could be paid to a circuit court clerk who terminates his membership and requests a refund under the provisions of

subsection 2 of § 104.350 of House Bill 983 as enacted by the 80th General Assembly. 2. A refund of accumulated contributions could be paid to a beneficiary or the estate of a circuit court clerk under the provisions of subsection 3 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly in the event of the death of a circuit court clerk. 3. A refund of accumulated contributions could be paid to a circuit court clerk at retirement under the present provisions of subsection 2 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly. 4. A refund of accumulated contributions could not be paid to a circuit court clerk prior to retirement under the present provisions of subsection 4 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly and signed into law by the Governor on February 14, 1980.

September 8, 1980

OPINION NO. 177

Mr. Al F. Holmes, Jr.
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101

Dear Mr. Holmes:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

Advice is requested as to whether or not the Secretary of the Missouri State Employees' Retirement System has authority to refund the employee contributions that Circuit Clerks may pay into the Retirement System in order to establish prior membership credit with the Retirement System in accordance with the provisions of subsection 7 of § 104.340 RSMo, 1978. Specifically, advice is needed as to certain factual situations which are set forth on the attached sheet. (See attached sheet).

In addition, you have attached certain specific questions which read as follows:

A. Whether a refund could be paid to a Circuit Clerk who terminates his membership and requests a refund under the provisions of subsection 2 of § 104.350 of House Bill 983.

B. Whether a refund or a death benefit could be paid to a beneficiary or the estate of a Circuit Court Clerk under the provisions of § 104.430 RSMo 1978 or subsection 3 of § 104.372 of House Bill 983 in the event of the death of a Circuit Clerk.

C. Whether a refund of accumulated contributions could be paid to a Circuit Clerk at retirement under the present provisions of subsection 2 of § 104.372 of House Bill No. 983 as enacted by the 80th General Assembly and signed into law by the Governor on February 14, 1980.

D. Whether a refund of accumulated contributions could be paid to a Circuit Court Clerk prior to retirement, as other refunds have been paid to those members or vested members who were employees on or after August 31, 1972, under the present provisions of subsection 4 of § 104.372 of House Bill No. 983 as enacted by the 80th General Assembly and signed into law by the Governor on February 14, 1980.

Subsection 7 of § 104.340, RSMo 1978, reads as follows:

7. Any person who is a circuit clerk on June 30, 1980, or a deputy circuit clerk or division clerk on June 30, 1981, and who by virtue of becoming a state employee on the next day, respectively, becomes a member shall be entitled to prior service credit for service rendered as a circuit clerk, deputy circuit clerk, division clerk or the clerk, deputy or assistant clerk of one of the courts (other than a municipal court) whose jurisdiction is transferred to the circuit court on January 2, 1979, if:

(1) The person was on the day immediately before becoming a member of the Missouri state employees' retirement system a member of the St. Louis city employees' retirement system, a member of the Missouri local government employees' retirement system under the provisions of sections 70.600 to 70.760, RSMo, or of a county retirement system established prior to October 13, 1967, or authorized by section 70.615, RSMo;

(2) The person makes application to the board for such prior service credit within ninety days after becoming a member of the Missouri state employees' retirement system and established such service to the satisfaction of the board; and

(3) The person pays into the fund within one hundred eighty days after becoming a member of the Missouri state employees' retirement system an amount equal to any contributions paid into any such city, local employees or county retirement system by him or in his behalf by virtue of service rendered in such capacities which he received or could receive from such system as a refund upon withdrawal from such city, local or county retirement system.

Thus, under the provisions of subsection 7 of § 104.340, RSMo 1978, circuit court clerks became members of the Missouri State Employees' Retirement System as of July 1, 1980. As a result, these individuals have the right under the provisions of subsection 7(2) of § 104.340, RSMo 1978, to make an application to the Board of Trustees within ninety days of July 1, 1980 to establish prior service credit with the Retirement System if these individuals on the day before immediately becoming a member of the Missouri State Employees' Retirement System were members of the St. Louis City Employees' Retirement System, a member of the Missouri Local Government Employees' Retirement System or of a county retirement system established prior to October 13, 1967.

In addition, subsection 7(3) of § 104.340, RSMo 1978, requires these individuals within one hundred eighty days after becoming a member of the Missouri State Employees' Retirement System on July 1, 1980, to pay an amount equal to any contributions paid into

such city, local employees' or county retirement fund by the individual or in his or her behalf by virtue of service rendered in such capacities which he or she received or could receive from such system as a refund upon withdrawal from such city, local or county retirement system.

Finally, House Committee Substitute for House Bill No. 983 of the Second Regular Session of the 80th General Assembly, with an emergency clause, was signed into law by the Governor and became effective on February 14, 1980. This legislation repealed §§ 104.060, 104.330, 104.365, 104.370, 104.372, 104.380, 104.390, 104.410, and 104.612, RSMo 1978, and § 104.350, RSMo Supp. 1979, relating to contributions by and retirement benefits for members of certain state retirement systems, and enacted in lieu thereof ten new sections relating to the same subject.

With the above legislative history in mind, we now consider the various issues raised in your opinion request. First of all, you inquire as to whether or not a refund could be paid to a circuit clerk who terminates his membership and requests a refund under the provisions of subsection 2 of § 104.350 of House Bill 983. In this regard, subsection 2 of § 104.350 of House Bill 983 reads as follows:

2. Upon withdrawal from service, any member who is not entitled to a normal annuity or disability benefits under the provisions hereof shall receive, upon written application, a refund of the amount of his accumulated contributions to the fund not previously refunded. The board, in its discretion, may withhold payment of a refund for a period not to exceed one year after a member has ceased to be an employee.

Therefore, in response to the first factual situation presented, it is our view that a refund could be paid to a circuit clerk who terminates his membership and requests a refund under the provisions of subsection 2 of § 104.350 of House Bill 983.

You have also inquired whether or not a refund or a death benefit could be paid to a beneficiary or the estate of a circuit court clerk under the provisions of § 104.430, RSMo 1978, or subsection 3 of § 104.372 of House Bill 983 in the event of the death of a circuit clerk. Section 104.430 could not, in any event apply to circuit court clerks. Subsection 3 of § 104.372 of House Bill 983 reads as follows:

3. When an employee dies on or after September 1, 1972, the board shall pay to such beneficiary as the employee may have designated in writing, or to his estate if no beneficiary be desig-

nated, an amount equal to his accumulated contributions plus credited interest not previously refunded to the date of death.

Therefore, in view of the above statutory provisions, and in response to the second factual situation presented, it is our view that a refund could be paid to a beneficiary or the estate of a circuit court clerk under the provisions of subsection 3 of § 104.372 of House Bill 983 in the event of the death of a circuit clerk.

Another factual situation that you have presented is whether or not a refund of accumulated contributions could be paid to a circuit clerk at retirement under the present provisions of subsection 2 of § 104.372 of House Bill 983. In this regard, subsection 2 of § 104.372 of House Bill 983 reads as follows:

2. When a member who was an employee on or after August 31, 1972, thereafter retires, or when a former member who has been restored creditable service in accordance with the provisions of subsection 4 or 6 of section 104.350 retires, or who is entitled to a deferred annuity under subsection 4 of section 104.330, the board shall pay him an amount equal to his accumulated contributions and credited interest not previously refunded to the date of his retirement. This amount is in addition to any retirement benefits to which he is entitled; but, the provisions of this subsection shall not apply to members who elect to receive benefits because of service in the general assembly.

Under the above statutory provision, when a member who was an employee on or after August 31, 1972, thereafter retires, the board shall pay him an amount equal to his accumulated contributions and credited interest not previously refunded to the date of his retirement. It is to be noted that the legislature has added the phrase "or after" August 31, 1972 in House Bill 983. Cf. subsection 2 of § 104.372, RSMo 1978. In this regard, there is authority for the proposition that a change in a statute is ordinarily intended to have some effect and the legislature will not be charged with having done a meaningless act. State ex rel. Thompson - Stearns - Roger v. Schaffner, 489 S.W.2d 207 (Mo. 1973). As a result, and in response to the third factual situation presented, it is our view that a refund of accumulated contributions could be paid to a circuit court clerk at retirement under the present provisions of subsection 2 of § 104.372 of House Bill 983.

Lastly, you have inquired as to whether or not a refund of accumulated contributions could be paid to a circuit court clerk prior to retirement, as other refunds have been paid to those members or vested members who were employees on or after August 31, 1972; under the present provisions of subsection 4 of § 104.372 of House Bill 983. In this regard, subsection 4 of § 104.372 of House Bill 983 reads as follows:

4. Within ninety days after the effective date of this act or within ninety days after reinstatement of membership under subsection 6 of section 104.350, whichever occurs later, when a member or vested member who was an employee on or after August 31, 1972, shall so request in writing, the board shall immediately pay to that employee all accumulated contributions made on account of service rendered through August 31, 1972, and not previously refunded, plus credited interest to the date the payment is made by the board, and such refund of contributions and interest shall not in any way change any benefits or rights which the employee may be entitled to from the system.

Under the above statutory provision, within ninety days after the effective date of the act or within ninety days after reinstatement of membership under subsection 6 of § 104.350, whichever occurs later, and when a member or vested member who was an employee on or after August 31, 1972, shall so request in writing, the board shall immediately pay to that employee all accumulated contributions and interest made on account of service rendered through August 31, 1972, and not previously refunded. As was previously pointed out, House Bill 983 became effective on February 14, 1980. Therefore, in view of the fact that no circuit court clerk could become a member of the system within 90 days after the effective date of the act and in view of the fact that no circuit court clerk could come within the provisions of subsection 6 of § 104.350, it is our view that a refund of accumulated contributions could not be paid to a circuit court clerk prior to retirement, under the present provisions of subsection 4 of § 104.372 of House Bill 983.

CONCLUSION

The opinion of this office is as follows:

1. A refund of accumulated contributions could be paid to a circuit court clerk who terminates his membership and requests

a refund under the provisions of subsection 2 of § 104.350 of House Bill 983 as enacted by the 80th General Assembly.

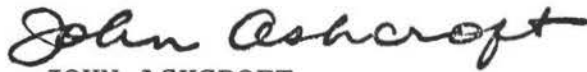
2. A refund of accumulated contributions could be paid to a beneficiary or the estate of a circuit court clerk under the provisions of subsection 3 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly in the event of the death of a circuit court clerk.

3. A refund of accumulated contributions could be paid to a circuit court clerk at retirement under the present provisions of subsection 2 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly.

4. A refund of accumulated contributions could not be paid to a circuit court clerk prior to retirement under the present provisions of subsection 4 of § 104.372 of House Bill 983 as enacted by the 80th General Assembly and signed into law by the Governor on February 14, 1980.

The foregoing opinion which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft".

JOHN ASHCROFT
Attorney General

ELECTIONS:

(1) Presidential electors are state officers elected to statewide office. Consequently, in order for a new party to meet the statutory requirements of § 115.315, RSMo 1978, and nominate presidential electors and place its candidate for the United States President before this State's electorate it must meet the signature and petition requirements imposed by § 115.315.4, RSMo 1978. (2) If a new political party submits a petition in which some of its candidates meet the requirements of § 115.315, RSMo 1978, and others do not, those that do are legally entitled to be placed on the ballot. (3) In order for a new political party to place its candidates on the ballot in this State it must give a complete list of the names and addresses, including the street and number, of all candidates to be nominated for office, as specifically called for in § 115.315.2(3), RSMo 1978.

August 22, 1980

FILED

179

OPINION NO. 179

Honorable James C. Kirkpatrick
Secretary of State
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This official opinion is being issued in response to three questions which you recently requested that this office rule upon; those questions are as follows:

1. Can a new political party qualify presidential and vice presidential candidates for the ballot on any other than a statewide basis, such as qualification in one or more congressional districts or in one or more general assembly districts?

2. If a new political party submits candidates for several different offices on a single petition form, such as for

Honorable James C. Kirkpatrick

president, vice president, state senator and state representative, and if the petition fails for the lack of the required ballot signatures for one or more of those offices, is it still proper to place on the ballot the names of other candidates in those districts in which they do have the required signatures?

3. May a new party qualify to put names of candidates on the ballot by merely indicating the number of general assembly districts in which they wish to qualify when they have omitted the names, addresses and offices of the candidates required under Section 115.315.2, RSMo?

We will answer the questions seriatim in the order presented above; however, before those questions are directly answered, the following background is presented:

It is our understanding that the instant opinion request has its genesis in an effort by the Citizens Party, potentially a new political party, to place its candidates on the ballot pursuant to § 115.315, RSMo 1978. The pertinent facts as submitted to us follow:

On petitions in several areas [the Citizens Party has] included the names of the presidential and vice-presidential candidates and electors, and the numbers of legislative districts in which they wish to qualify, and have not listed by name, address and office the candidates for those other offices. In other areas, they have submitted not only the name of the presidential and vice-presidential candidates and the electors, but also the names, addresses, and districts of candidates for general assembly.

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The total number of signatures submitted may not equal the total number required for a new party to be formed for the entire state. The Citizens Party apparently believes that presidential and vice-presidential candidates and presidential electors may be placed on the ballot in districts in which they meet the two percent ballot signature requirement, be they congressional or general assembly districts, even if the petition fails to meet the requirements for getting on the ballot statewide, since the statutes do not explicitly call the office of the presidency a statewide office for purposes of qualification in Missouri of new political parties.

A.

Your first question relates to whether a person running for the presidency of the United States may do so, in Missouri, "on any other than a statewide basis"

The statute most relevant to this inquiry is § 115.315, RSMo 1978. It states, in material part, as follows:

1. Any group of persons desiring to form a new political party throughout the state, or for any congressional district, state senate district, state representative district or circuit judge district, shall file a petition with the secretary of state. . . .

* * *

If presidential electors are to be nominated by petition, at least one qualified resident of each congressional district shall be named as a nominee for presidential elector. The number of candidates to be nominated shall equal the number of electors to which the state is entitled, and the name of their candidate for presi-

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dent and the candidate for vice president shall be printed on each page or a sheet attached to each page of the petition. The names of the candidates for president and vice president may be added to the party name, but the names of the candidates for president and vice president shall not be printed on the official ballot without the written consent of such persons. Their written consent shall accompany and be deemed part of the petition; . . .

* * *

4. If the new party is to be formed for the entire state, the petition shall be signed by the number of registered voters in each of the several congressional districts which is equal to at least one percent of the total number of votes cast in the district for governor in the last gubernatorial election, or by the number of registered voters in each of one-half of the several congressional districts which is equal to at least two percent of the total number of votes cast in the district for governor at the last gubernatorial election.

Based upon the foregoing it is clear that the answer to your first question does not revolve around whether the offices of the United States President and Vice President are statewide offices. The sole issue is whether the office of presidential elector is a statewide office; if it is, then a statewide party must be formed to support the candidacy of presidential electors. We reach this conclusion for the following reasons:

Americans do not, and never have, directly voted for either presidential or vice presidential candidates. See, Article II, § 1, and Amendment XII, United States Constitution. The citizens of each state vote for electors who, at a later date, meet and directly vote for the President and Vice President of the United States of America.

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Certainly, presidential electors are state officers. Walker v. United States, 93 F.2d 383 (8th Cir. 1937). It follows that when § 115.315, RSMo 1978, is read in conjunction with Chapter 128, RSMo 1978, the mandated conclusion is that Missouri's twelve presidential electors hold statewide office since each elector's office is subject to a statewide vote. Therefore, non-established political parties (see § 115.317, RSMo 1978) endeavoring to nominate presidential electors and place their candidate for president on the ballot must comply with the signature requirements found in § 115.315.4, RSMo 1978.

If the candidate is running for statewide office in Missouri then, by necessary implication, the party which supports him must also be statewide. If the candidate for statewide office chooses not to run as a candidate of an established political party, and does not wish to run as an independent candidate, he may form a new political party and choose to run as its candidate, provided that he has sufficient statewide support. Section 115.315.4, RSMo 1978.

The Citizens Party may become a new political party in this State as defined by § 115.317, RSMo 1978. While its candidate for the United States presidency is Barry Commoner, the citizens of this State may only vote for presidential electors nominated by the Citizen's Party if it is established as a new political party. Since presidential electors are state officers and hold statewide office any new political party formed to support them must necessarily also be statewide; therefore, in order for this potential new political party--the Citizens Party--to be able to nominate presidential electors and get its candidates for United States President and Vice President on the ballot, it must meet the signature requirements in § 115.315.4, RSMo 1978.

The signature requirements found in § 115.315.4, RSMo 1978, are not onerous, and they serve substantial and compelling state interests. As stated by Mr. Justice Stevens, concurring in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979):

Placing additional names on a ballot
adds to the cost of conducting elections

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and tends to confuse voters. The State therefore has a valid interest in limiting access to the ballot to serious candidates. . . .

Id., 440 U.S. at 189, 59 L.Ed.2d at 244. And, as stated by the Court in Jenness v. Fortson, 403 U.S. 431, 442, 29 L.Ed.2d 554, 562-563, 91 S.Ct. 1970 (1971):

There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot --the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. . . .

Or, as the Court stated in Lubin v. Panish, 415 U.S. 709, 39 L.Ed.2d 702, 94 S.Ct. 1315 (1974):

That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success.

* * *

[W]e note that there are obvious and well-known means of testing the "seriousness" of a candidacy which do not measure the probability of attracting significant

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voter support solely by the neutral fact of payment of a filing fee. States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election. . . .

Id., 415 U.S. at 715-716 and 718, 39 L.Ed.2d at 708 and 710.

The State of Missouri, by requiring new political parties to show a modicum of political support indicating the seriousness of their candidates, is using a well-established technique continuously found constitutional, appropriate, and acceptable by the United States Supreme Court. Surely, it cannot be contended that Missouri's signature requirements are burdensome for the truly serious candidate with even miniscule support. If the Citizens Party endeavored to get signatures from two percent of those who had voted in the last gubernatorial election, from five congressional districts, they would need only about 16,500 signatures. McCarthy v. Kirkpatrick, 420 F.Supp. 366, 371 n.7 (W.D. Mo. 1976).

In light of the foregoing we conclude that in order for a new party to nominate presidential electors it must comply with the signature and petition requirements of § 115.315.4, RSMo 1978.

B.

In your second question you ask if the names of the candidates of a new party who do meet the petition and the signature requirements of Chapter 115, RSMo 1978, can be placed on the ballot even if that new political party submits candidates for other offices in a single petition form who fail to meet the signature and petition requirements in that Chapter.

We answer this inquiry in the affirmative. Section 115.315, RSMo 1978, allows a new political party to be formed and limited, if it so desires, to a particular geographical section of this State. Since § 115.315, RSMo 1978, requires that the new party place on its petition a complete list of

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the names and addresses of all candidates to be nominated for office, and the offices for which each candidate is to be nominated, even if the new party fails to qualify for the entire State, if it meets the test in § 115.315.5, RSMo 1978, for a legislative district, or any other enumerated section of the State, the new party should be considered formed for that district or section and the name of the candidate or candidates placed on the ballot.

C.

In your third and final question you inquire as to whether a new party meets the requirements of § 115.315, RSMo 1978, and legally entitled to place its candidates on the ballot "by merely indicating the number of general assembly districts in which they wish to qualify when they have omitted the names, addresses and offices of the candidates required under Section 115.315.2, RSMo?"

Section 115.315.2(3), RSMo 1978, states:

2. Each page or a sheet attached to each page of each petition for the formation of a new political party shall:

* * *

(3) Give a complete list of the names and addresses, including the street and number, of all candidates to be nominated for office; . . .

Axiomatically, for a new party to be able to place a candidate on the ballot it must specifically state the names and addresses of its proposed candidates. Any petition which merely mentions the legislative district for which the new party wishes to qualify may not legally be considered a valid petition with respect to that district. Not only does such a defective petition fail to meet the statutory requirement just quoted, it also fails to indicate to the public and potential petition signers whom they are selecting to run for office.

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CONCLUSION

1. It is the opinion of this office that presidential electors are state officers elected to statewide office. Consequently, in order for a new party to meet the statutory requirements of § 115.315, RSMo 1978, and nominate presidential electors and place its candidate for the United States President before this State's electorate it must meet the signature and petition requirements imposed by § 115.315.4, RSMo 1978.

2. If a new political party submits a petition in which some of its candidates meet the requirements of § 115.315, RSMo 1978, and others do not, those that do are legally entitled to be placed on the ballot.

3. In order for a new political party to place its candidates on the ballot in this State it must give a complete list of the names and addresses, including the street and number, of all candidates to be nominated for office, as specifically called for in § 115.315.2(3), RSMo 1978.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Michael Hillel Finkelstein.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized script.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

October 30, 1980

OPINION LETTER NO. 180

Honorable Marion G. Cairns
Representative, District 96
17 East Swon Avenue
Webster Groves, MO 63119



Dear Representative Cairns:

This is in response to your opinion request asking the following question:

How are the proceeds of a sale of bonds by a county to be disposed of when there is no intention of using the bond proceeds for the purpose for which their sale was approved by the voters of the county?

The facts which you give are as follows:

In 1964 voters of St. Louis County approved the issuance of \$5 million of bonds to finance the construction of incinerators for the county. Some of those bonds were sold and the proceeds placed in the bank. However, no incinerators were ever constructed and the county now has no intention of constructing incinerators.

There seems to be no legal way of disposing of the excess of money remaining from the sale of those bonds. Article VI, Section 29 of the Constitution of Missouri states, 'The moneys arising from any loan, debt, or liability contracted by the state, or any county, city, or other political subdivision, shall be applied to the purposes

Honorable Marion G. Cairns

for which they were obtained, or to the repayment of such debt or liability, and not otherwise.'

I am requesting your opinion as to how those funds may legally be disposed of.

We gather from your question and the facts as related in the request that at the time of the issuance of the bonds there was an intention to purchase incinerators which did not materialize for either a lack of need or for some other reason. We also believe that your request indicates that the bond money has not been used for any other purpose. You further anticipate that the proceeds from the sale of the bonds will be used to repay the bondholders and retire the bonds that there may be some excess money left over.

However, we believe that § 108.180, RSMo 1978, resolves the dilemma. This section provides in part:

[P]rovided further, that any bonds or money remaining in the interest and sinking fund of any such county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, after the extinction of the indebtedness for which such bonds were issued, shall be paid into the general revenue fund of such county, city, incorporated town or village, or other political corporation or subdivision, and into the building fund of such school district.

We believe that the legislative intent in the above statute is clear. We have found no cases which would help us on this subject. We, therefore, conclude from a plain reading of the language in the statute that the excess money after the bonds are retired remaining in the interest and sinking fund shall be paid according to § 108.180, RSMo 1978.

Very truly yours,



JOHN ASHCROFT
Attorney General

JUVENILES:
DRIVING WHILE INTOXICATED:

A sixteen year old person arrested
for violation of a state or municipal
traffic ordinance or regulation,
the violation of which does not

constitute a felony, who refuses to submit to a chemical test to
determine the alcoholic content of his or her blood, is subject to
provisions of § 577.050, RSMo, relating to penalties for failure to
submit to such test.

October 27, 1980

OPINION NO. 181



The Honorable Stephen N. Limbaugh, Jr.
Prosecuting Attorney
Cape Girardeau County
Common Pleas Courthouse
Cape Girardeau, Missouri 63701

Dear Mr. Limbaugh:

This letter is in response to your request for an official
opinion on the question whether a sixteen year old person is sub-
ject to the provisions of § 577.050, RSMo.

In Attorney General Opinion No. 311, Gepford, December 1,
1966, this office concluded that a person coming under the pro-
tection of the juvenile code who is taken into custody for driving
while intoxicated cannot be required to submit to a chemical test
of his breath but must, in accordance with procedural protections
afforded juveniles, be taken immediately before the juvenile court
or placed in the custody of the juvenile officer. However, this
opinion relied in part upon § 211.031(3), RSMo 1959, of the juvenile
code which gave exclusive jurisdiction to the juvenile court con-
cerning the suspension or revocation of a state or local license or
authority of a child to operate a motor vehicle. Section 211.031(3)
has since been amended by S.B. 512, 80th Gen. Assembly. That
portion of Juvenile Code, § 211.031, S.B. 512, 80th Gen. Assembly,
dealing with the operation of a motor vehicle by a child, provides
as follows:

1. Except as otherwise provided herein,
the juvenile court shall have exclusive origi-
nal jurisdiction in proceedings:

* * *

The Honorable Stephen N. Limbaugh, Jr.

(3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony; (S.B. 512, 80th Gen. Assembly.) (Emphasis added.)

Therefore, the question is whether this reduction in juvenile court jurisdiction has changed the result reached by the Gepford opinion.

Section 577.020, RSMo, provides in pertinent part:

1. Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.020, 577.030 and 577.050, a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of the acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated.

Section 577.050, RSMo, provides in pertinent part:

1. If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request shall include the reasons of the officer for requesting the person to submit to a test and which also shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given. In this event, the arresting officer, if he so believes, shall make a sworn report to the director of revenue that he has reasonable grounds to believe that the arrested person was driving a motor vehicle upon

The Honorable Stephen N. Limbaugh, Jr.

the public highways of this state while in an intoxicated condition and that, on his request, refused to submit to the test. Upon receipt of the officer's report, the director shall revoke the license of the person refusing to take the test for a period of no more than one year; or if the person arrested be a nonresident, his operating permit or privilege shall be revoked for not more than one year; or if the person is a resident without a license or permit to operate a motor vehicle in this state, an order shall be issued denying the person the issuance of a license or permit for a period of not more than one year.

If a juvenile is arrested for an offense which is within the jurisdiction of the juvenile court then the conclusion in the Gepford opinion would still be valid. The juvenile would have to be taken before the juvenile court or placed in the custody of the juvenile officer and no chemical test could be performed. It is only when the arrest is for an offense which is no longer under the jurisdiction of the juvenile code that the basis of the Gepford opinion changes and therefore requires re-evaluation.

The juvenile code, Chapter 211, RSMo, prescribes specific procedures for the handling of juveniles when they are taken into custody. Under § 211.131.1, RSMo:

When any child found violating any law or ordinance . . . is taken into custody, the taking into custody is not considered an arrest.

Section 211.061.1 provides that:

When a child is taken into custody with or without warrant for an offense, the child, together with any information concerning him and the personal property found in his possession, shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him.

If these sections are applicable, a juvenile who is taken into custody is not under arrest and therefore the requirements of

The Honorable Stephen N. Limbaugh, Jr.

§§ 577.020 and 577.050, that the person be under arrest, are not met. Further, the juvenile would have to be taken immediately and directly before the juvenile court or delivered to a juvenile officer or person acting for him. Therefore, the question becomes whether a sixteen year old juvenile who is taken into custody for a violation of a traffic regulation or ordinance, the violation of which does not constitute a felony, is entitled to the procedural protections accorded juveniles in Chapter 211 even though the juvenile court does not have jurisdiction.

The purpose of Chapter 211, the juvenile code, was declared by the legislature to be:

[T]o facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, perferably in his own home, as will conduce to the child's welfare and the best interests of the state. (Emphasis added.)
Section 211.011, RSMo 1978.

This section indicates an intent on the part of the legislature to protect only those children who come within the juvenile court's jurisdiction. In State v. Arbeiter, 408 S.W.2d 26, 29 (Mo. 1966), the court, in interpreting the then existing juvenile code, stated that once police consider that they have sufficient reason to take a juvenile into custody, they are required to take him "immediately and directly" to the juvenile court and it thereafter became the function of that agency to determine, in accordance with the procedures established in Chapter 211, whether or not sufficient grounds existed for the court's exercise of its jurisdiction. However, the Arbeiter opinion indicates there was no question at that time that the appellant's age of fifteen subjected him to the exclusive jurisdiction of the juvenile court in any proceeding involving an alleged criminal offense. Thus, the court was not faced with the situation where a juvenile was taken into custody for alleged violation of a state law or municipal ordinance, but where the juvenile court could lack jurisdiction. Therefore, the Arbeiter opinion did not decide the question herein presented.

The Honorable Stephen N. Limbaugh, Jr.

The amendment to § 211.031 contained in Senate Bill 512, 80th General Assembly, removes violations of traffic ordinances and regulations, the violation of which does not constitute a felony, from the jurisdiction of the juvenile courts. This indicates an intent on the part of the legislature to treat children sixteen years of age who violate such ordinances or regulations the same as adults. However, if the procedures in §§ 211.061 and 211.131.1 are held to apply when such children are taken into custody even though the juvenile court lacks jurisdiction, the apparent intent of the legislature to treat children sixteen years of age who violate traffic ordinances or regulations as adults will be frustrated. An officer who places such a juvenile under arrest for a traffic violation would be required to take the juvenile either before the juvenile court or the juvenile officer. Thus for every arrest of a juvenile for such a violation the juvenile officer would be involved and the juvenile court consulted even though the court lacked jurisdiction. The purpose of the juvenile code would not be furthered since it was intended to protect only those children who come within the jurisdiction of the juvenile court. Upon considering the amendment of the juvenile court's jurisdiction, and the apparent intent behind that amendment, in relation to the purpose of the juvenile code as set out by the legislature, it would appear to be contrary to both the purpose and intent to find that the procedural requirements of the juvenile code are applicable even though the court lacks jurisdiction.

The legislature has excluded from the jurisdiction of the juvenile court a sixteen year old child's violation of state or municipal traffic ordinances or regulations the violation of which is not a felony. Since it would be inconsistent to exclude the violation of traffic ordinances and regulations from the jurisdiction of the juvenile court, but still require the procedural protections contained in the juvenile code to be followed, it is the opinion of this office that the procedural protections of the juvenile code are applicable only when the juvenile court has jurisdiction. Since the jurisdiction of the juvenile court has changed and the juvenile court no longer has jurisdiction over violation of traffic ordinance or regulations which are not felonies, a juvenile arrested for such an offense is subject to the provisions of § 577.050, RSMo 1978. Opinion No. 311, Gepford, December 1, 1966, is therefore withdrawn.

The Honorable Stephen N. Limbaugh, Jr.

CONCLUSION

Therefore, it is the opinion of this office that a sixteen year old person arrested for violation of a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony, who refuses to submit to a chemical test to determine the alcoholic content of his or her blood, is subject to provisions of § 577.050, RSMo, relating to penalties for failure to submit to such test.

The foregoing opinion, which I hereby approve, was prepared by my Assistant John C. Reed.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

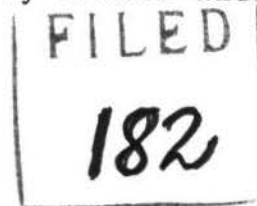
65102

(314) 751-3321

September 2, 1980

OPINION LETTER NO. 182
(Answer by Letter-Wieler)

The Honorable Ralph Uthlaut, Jr.
State Senator
Route 1
New Florence, Missouri 63363



Dear Senator Uthlaut:

This letter is written in response to your request for an opinion concerning use of the highways by a certain vehicle. Specifically, you asked whether the vehicle, known as a "heavy-doo-dee brand bale transporter", is exempt from the licensing requirements of the State of Missouri and the width regulations. Also, you asked if the answer to the questions raised would be different if the vehicle were towed by a vehicle other than a farm tractor, such as a pickup truck.

In reviewing the description of the vehicle in question as well as the photographs provided, it is apparent that the "heavy-doo-dee brand bale transporter" is a two-wheeled farm wagon designed specifically for carrying large round hay bales. It can be towed behind a farm tractor or any other motor vehicle with a trailer hitch. It is seventeen feet long and equipped with telescoping arms which can be extended to make the vehicle 122 inches wide. The vehicle is designed in this manner so that the arms can be extended to carry large hay bales. When the arms are not extended, the vehicle is only ninety-four inches wide.

Section 301.020, RSMo 1978, requires every owner of a motor vehicle or trailer which shall be operated or driven upon the highways of this state (with certain exemptions which are not relevant here) to annually register that vehicle with the Director of Revenue and pay a license fee. The term "trailer" is defined in § 301.010(33), H.B. Nos. 995 and 1051, 80th General Assembly, presently effective, as

The Honorable Ralph Uthlaut, Jr.

"any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle" However, the term "vehicle" is defined in § 301.010(36) as "any mechanical device on wheels, designed primarily for use on highways" Therefore, in order to be subject to the licensing requirements of Missouri law, the "heavy-doo-dee brand bale transporter" would have to be a vehicle designed primarily for use on the highways. In our opinion, it is not so designed. Although obviously capable of being operated on the highways and intended for such use occasionally for short distances, this vehicle is a highly specialized farm wagon designed for the purpose of moving large round hay bales from hay fields to places of storage, or from places of storage to feed lots. Its primary function appears to be agricultural and its use of the highways is intended to be incidental.

For the same reason, such a vehicle is exempt from the width restrictions contained in § 304.170, S.B. No. 508, 80th General Assembly, presently effective. Although subsection one of that section prohibits the operation of any vehicles wider than ninety-six inches upon the highways of this state, subsection 7 (1) exempts from these restrictions the occasional operation of agricultural implements for short distances. In our opinion, the "heavy-doo-dee brand bale transporter" constitutes an agricultural implement. As such, its occasional use upon the highways of this state for short distances with arms fully extended to accommodate large hay bales would not constitute a violation of the width regulations in § 304.170.

The character of the towing vehicle does not require a different answer. If an agricultural implement is designed primarily for agricultural purposes, and in conjunction therewith is only used occasionally upon the highways of this state, the fact that it is towed by a pickup truck or other motor vehicle has no bearing on the question of whether the vehicle is exempt from licensing requirements and width regulations. Obviously, extensive use of the highways by such a vehicle being towed behind a pickup truck for long

The Honorable Ralph Uthlaut, Jr.

distances might discredit the claim of the manufacturer that said vehicle is designed for agricultural purposes and not for use on the highways. However, this is a factual determination which cannot be undertaken by this office. From the materials supplied to us, it appears that the "heavy-doo-dee brand bale transporter" is a farm implement and thereby exempt from licensing or width regulations when operated on the highways of this state.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

September 24, 1980

OPINION LETTER NO. 187
(Answered by letter-Klaffenbach)

The Honorable Marvin E. Proffer
State Representative, District 155
Route 1
Jackson, Missouri 63755



Dear Mr. Proffer:

This letter is in response to your question asking:

Will an appointed nonlawyer municipal judge be barred from holding such office in a city which is certified to have a population of more than 7,500 by the 1980 United States Census if this person had not served as municipal judge for that municipality for at least three years prior to January 2, 1979?

You also state:

The city of Jackson, Missouri, had a population of 5,896 by the 1970 census. A nonlawyer was appointed municipal judge of that city, and this appointee completed the course of instruction required by the provisions of §479.020, RSMo. He had not served as judge for the city of Jackson for at least three years prior to January 2, 1979.

It now appears that Jackson will have a population of more than 7,500 by the 1980 census.

It is also our understanding that the municipal judge was appointed to serve the unexpired portion of the term of the previous police judge, who resigned such term ending April 30, 1981. We assume he has met all the eligibility requirements of § 479.020, RSMo.

The Honorable Marvin E. Proffer

Subsection 3 of § 479.020, RSMo, which was part of the court revision bill, provides:

No person shall serve as a municipal judge of any municipality with a population of seven thousand five hundred or more or of any municipality in a county of the first class with a charter form of government unless he be licensed to practice law in this state unless, prior to January 2, 1979, he has served as municipal judge of that same municipality for at least three years.

This provision became effective January 2, 1979, and we have no precise precedent to guide us. The official census will become effective July 1, 1981, for the purposes of determining the population of the city under subsection 3 of § 479.020. Section 1.100, RSMo. As we have noted, the term of this judge will expire April 30, 1981, before the census becomes effective. It is arguable that the judge could be appointed for the succeeding two year term before the population change becomes effective and be allowed to serve out his term despite such change because the courts are reluctant to interfere with the term of an officer who was eligible when appointed. However, in this instance it will be obvious by the time any such appointment is made that the judge would be ineligible for appointment after July 1, 1981, if there is such a change in population because the three year service requirement under § 479.020 applies only to service before January 2, 1979.

In these premises, we are doubtful that the judge should be considered eligible for appointment prior to July 1, 1981, for a two year term. Since subsection 1 of § 479.020 requires that municipal judges be selected for a term of not less than two years, as provided by ordinance, we do not believe that the judge is eligible for reappointment.

Very truly yours,



JOHN ASHCROFT
Attorney General

See 261-1967

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

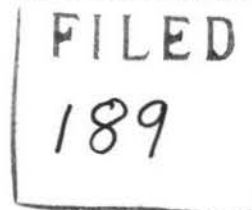
65102

(314) 751-3321

September 19, 1980

OPINION LETTER NO. 189
(Answered by letter - Wieler)

The Honorable Meredith Ratcliff
Prosecuting Attorney of Adair County
P. O. Box 422
Kirksville, Missouri 63501



Dear Mr. Ratcliff:

This letter is in response to your request for an opinion as to whether the appointment to employment of a niece of the wife of a brother by the Adair County Circuit Clerk would violate VII, § 6, of the Missouri Constitution. This article forbids the employment or appointment to public office by a public official of any relative within the fourth degree of relationship, by consanguinity or affinity.

Under the factual situation outlined in your opinion request, the Circuit Clerk of Adair County wishes to appoint the niece of her brother's wife to a public position. Obviously, no question of consanguinity exists here because the parties are not blood relatives. Under principles of affinity as laid out in State v. Thomas, 174 S.W.2d 337, (Mo. 1943), the clerk's brother is related to the niece of his wife through marriage. However, as stated in the Thomas case:

A kinship by affinity -- arising through marriage -- exists only between each spouse and the blood relatives of the other spouse.
State v. Thomas, Id. at 338.

Therefore, the Circuit Clerk of Adair County is not related by affinity to the relatives of the wife of the clerk's brother. The appointment of a niece of the clerk's brother's wife would not violate Article VII, § 6, of the Missouri Constitution.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

LIQUOR : It is lawful for a city or municipality to enact an ordinance prohibiting the sale of liquor on days of any special, county, township, city, town or municipal election.

October 31, 1980

OPINION NO. 190

The Honorable Gladys Marriott
State Representative
District 37
State Capitol Bldg., Room 313D
Jefferson City, Missouri 65101



Dear Ms. Marriott:

Your official request for an opinion concerns the following question of law:

Since the passage of Senate Bill No. 192, the State will allow the sale of liquor on certain election days. Does this new state law take precedence over existing city and municipal ordinances now in effect?

You stated in your opinion request the following facts giving rise to the question of law:

It seems that in most of the cities and municipalities in the state the city and municipal ordinances in force are keeping many liquor establishments closed on election day even though the legislature passed S.B. # 192 allowing them to be open on certain election days.

Senate Bill No. 192, First Regular Session, 80th General Assembly relates to the sale of intoxicating liquor on certain election days and repealed §§ 311.290 and 311.480, RSMo 1978 and enacted in lieu thereof, two new sections, §§ 311.290 and 311.480, RSMo 1979 Supp. (effective January 1, 1980). Section 311.290, RSMo 1978 stated in pertinent part:

No person having a license under this law nor any employee of such person shall sell, or give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity. . . after 1:30 a.m. upon the day of any general, special or primary election in this state at which candidates for public office are elected or nominated or after 1:30 a.m. upon the day of any county, township, city, town or municipal election at which candidates for public office are elected or nominated, and if said person has a license to sell intoxicating liquor by the drink, his premises shall be and remain a closed place as defined in this section after 1:30 a.m.. . .[E]xcept that the sale of

Representative Gladys Marriott

intoxicating liquor may be resumed and the premises reopened on any such election day after the expiration of 30 minutes next following the hour of time fixed by law for the closing of the polls at any such election. [emphasis added]

Section 311.290, RSMo 1979 Supp. (effective January 1, 1980), states in pertinent part as follows:

No person having a license under this law nor any employee of such person shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity. . . after 1:30 a.m. upon the day of any general or primary election in this state at which candidates for public office are elected or nominated. If the person has a license to sell intoxicating liquor by the drink, his premises shall be and remain a closed place as defined in this section after 1:30 a.m. upon the day of any general or primary election in this state at which candidates for public office are to be elected or nominated. . . except that the sale of intoxicating liquor may be resumed and the premises reopened on any general or primary election day after the expiration of 30 minutes next following the hour or time fixed by law for the closing of the polls at any such election. [emphasis added]

The purpose of Senate Bill No. 192 was to permit the sale of intoxicating liquor in any quantity on the day of any special, county, township, city, town or municipal election. The sale of liquor on days of general and primary elections are still prohibited as provided by § 311.290, RSMo 1979 Supp. (effective January 1, 1980).

There is no doubt that a city may regulate and control the sale of intoxicating liquor as that power is specifically granted by § 311.220(2), RSMo 1978. However, in order for the municipal ordinance to be valid, it must be in harmony with the statutory law upon the same subject. § 311.220(2); State ex rel Hewlett et al. v. Womach, 355 Mo. 486, 196 S.W.2d 809, 812 (banc 1946); Fishbach Brewing Company v. City of St. Louis, 231 Mo.App. 793, 95 S.W.2d 335, 338 (1936); Crackerneck Country Club, Inc., v. City of Independence, 522 S.W.2d 50, 51 (Mo.App., K.C.D. 1974). In this respect, it has been held that an ordinance and a statute are in conflict when their express or implied provisions are so inconsistent and irreconcilable that the statute annuls the ordinance. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 S.W. 516, 518-519 (banc 1908); Crackerneck Country Club, Inc. v. City of Independence, supra. at 51. Although an ordinance may

Representative Gladys Marriott

enlarge upon the provisions of a statute by requiring more than the statute requires, it may not prohibit what the statute permits nor permit what the statute prohibits. State v. Womach, supra at 815; Nickols v. North Kansas City, 358 Mo. 402, 214 S.W.2d 710, 712 (1948).

It has been held that an ordinance which prohibited the sale of alcoholic beverages during hours permitted by statute was not inconsistent with the statute. City of Maryville v. Wood, 358 Mo. 584, 216 S.W.2d 75 (1948). But, in this respect, see also Attorney General Opinion letter No. 97 rendered on September 22, 1975, wherein this office expressed the opinion that:

A city does not have the authority by ordinance to prohibit the sale of intoxicating liquor on Sunday by those holding licenses issued by the State of Missouri pursuant to the provisions of § 311.095 and § 311.097 [restaurant bar-Sunday license].

That opinion relied on the decision of the Kansas City Court of Appeals in Crackerneck Country Club, supra, wherein the Court of Appeals held that a municipal ordinance for the City of Independence was prohibitory rather than regulatory and, for that reason, invalid. The court came to that conclusion because the ordinance was in conflict with § 311.097 RSMo 1978, as the ordinance operated to "nullify" the State Sunday license altogether and was therefore invalidly prohibitory.

In Crackerneck, supra, the Court distinguished Nickols v. North Kansas City, supra, wherein the Supreme Court of Missouri held that a city ordinance which made unlawful the sale of 3.2% beer [nonintoxicating beer] on Sunday was regulatory of, and not in conflict with, a state licensing statute which authorized such sale every day, except between the hours of 1:30 a.m. and 6:00 a.m. The distinction, the Kansas City Court of Appeals reasoned, lies in the fact that the Nichols ordinance left the State license reasonably intact since under the license, the retailer could still sell 3.2% beer the remaining six days of the week.

The precise issue presented to this office for opinion is whether a municipality may by ordinance prohibit the sale of liquor on certain election days wherein the state liquor control laws allow such a practice. This office, with respect to the precise question, has found no controlling case authorities nor Attorney General Opinions. It should be noted at this point, however, that the rationale employed by the above-mentioned appellate decisions can be extended for the purpose of resolving this precise issue.

Representative Gladys Marriott

Senate Bill No. 192 repealed §§ 311.290 and 311.480, RSMo 1978 and enacted in lieu thereof two new sections, 311.290 and 311.480, RSMo 1979 Supp. The bill basically changed the State prohibition against selling intoxicating liquor on days of special, county, township, city, town or municipal elections. The bill did not provide for the granting of a special license by the Supervisor of Liquor Control for the sale of intoxicating liquors on the above-mentioned election days. Therefore, it is the opinion of this office, that a municipal ordinance prohibiting the sale of intoxicating liquors on the above-mentioned election days would not be invalidly prohibitory, but rather, validly regulatory as it would not operate to nullify the state license altogether.

CONCLUSION

It is, therefore, the opinion of this office that it is lawful for a city or municipality to enact an ordinance prohibiting the sale of liquor on days of any special, county, township, city, town or municipal election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Edward F. Downey.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

November 13, 1980

OPINION LETTER NO. 191

(Answer by Letter-Wieler)

The Honorable Truman E. Wilson
State Senator
State Capitol Building
Jefferson City, Missouri 65101

FILED

191

Dear Senator Wilson:

This letter is being written in response to your request for an opinion as to whether certain vehicles can be operated legally upon the highways of this state. The vehicle in question is a motor vehicle unit especially designed for removing sludge from sewage treatment plants and transporting it to disposal sites. The unit consists of a truck chassis mounted on super wide high flotation tires which allow it to be operated over fields in all weather conditions without becoming stuck or causing damage to the surface of the land. A storage tank is mounted on the chassis along with the necessary pumps for filling the tank and spreading the sludge over the disposal site through various types of applicators.

In your request, you mentioned the State Highway Patrol's position regarding a particular sludge disposal unit of the type mentioned above known as "Big Wheels." In order to respond, it was necessary to review both the letter of August 22, 1980, addressed to you from the superintendent of the highway patrol, A. R. Lubker, as well as an advertising brochure from the "Big Wheels" company.

In our opinion, a sludge disposal unit of this type cannot be operated legally upon the highways of this state. As described, this unit is approximately eleven feet wide. Section 304.170.1, RSMo, as enacted in Senate Bill No. 508,

The Honorable Truman E. Wilson

2nd Regular Session, 80th general Assembly, prohibits the operation of a vehicle upon the highways of this state wider than ninety-six inches. The only exception to that general rule is contained in subsection 7 of § 304.170 which exempts certain agricultural implements, certain towing or transporting vehicles, and implements of husbandry from the width requirements under certain circumstances. The suggestion has been made that a sludge disposal unit can be considered an "implement of husbandry." That term is defined in subsection 8 of § 304.170 as a self-propelled machine operating at speeds of less than thirty miles per hour which has been specifically designed or adapted for incidental over the road and primary off road usage and to be used exclusively for the application of commercial plant food materials or agricultural chemicals. Such a device cannot exceed a width of eleven feet, six inches. Emphasizing the fact that such a device is to be used for applying commercial plant food materials or agricultural chemicals to crop lands, the legislature provided in subsection 9 of § 304.140 that the purpose of the entire section is to permit a single trip per day by the implement of husbandry from the source of supply to a given farm.

The "Big Wheels" sludge disposal unit does not meet this definition. According to the manufacturer, it was not designed for making a single trip per day to agricultural fields for the purpose of spreading commercial plant foods or agricultural chemicals, but rather was designed for removing up to 100,000 gallons of sludge a day from sewage treatment plants. In order to do this, the manufacturer estimates that approximately six loads can be run per hour allowing five to six minutes for loading and unloading and four to five minutes for on the road travel time between the treatment facility and application sites. Although the unit could be operated in the field exclusively by using "nurse tanks" to bring the sludge material from the treatment plant to the disposal site, this is not contemplated in your opinion request or in the discussion with the highway patrol. Furthermore, there is a serious question as to whether sludge constitutes "commercial plant food materials or agricultural chemicals." In 10 CSR 80-2.010 (27), the Department of Natural Resources defines it as:

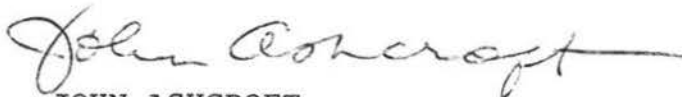
The Honorable Truman E. Wilson

Sludge means the accumulated semi-solid suspension of settled solids deposited from wastewaters or other fluids in tanks or basins.

Although sludge certainly may have nutrient value for plants, it is not an agricultural chemical and seemingly has little commercial value.

The exceptions contained in subsection 7 of § 304.170 simply do not apply to this particular vehicle. Therefore, the operation on the highways of this state of such a unit which is wider than ninety-six inches would be contrary to § 304.170.1, RSMo, as enacted in Senate Bill No. 508, 2nd Regular Session, 80th General Assembly.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY

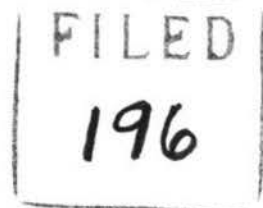
65102

(314) 751-3321

September 26, 1980

OPINION LETTER NO. 196
(Answer by letter-Klaffenbach)

The Honorable Edwin L. Dirck
Senator, District 24
Room 420, State Capitol Bldg.
Jefferson City, Missouri 65101



Dear Senator Dirck:

This letter is in response to your questions asking:

1. Except in Senatorial District No. 2, shall the senatorial district committees of senatorial districts that lie wholly or partially within St. Louis County be constituted in the manner provided by subsection 2 or by subsection 4 of Section 115.619, or by both said sections?
2. Section 115.615 states, in part, that 'The county chairman and vice-chairman so elected shall be (by) virtue thereof become members of the party congressional, senatorial and judicial committees of the district of which their county is a part': Does this mean that the chairman and vice-chairman of the St. Louis County Democratic Central Committee shall be members of all of the senatorial districts which are a part of St. Louis County?
3. If there is a conflict between a provision of the Constitution of the Missouri State Democratic Party and a provision of state statutory law regarding the members of senatorial district committees in St. Louis County and St. Louis City, which provision takes precedence?

The Honorable Edwin L. Dirck

You also state:

There have been some debate among members of the State Democratic Committee regarding which subsection of section 115.619 prescribes the constitution of the state senatorial district committees for senatorial districts 1, 7, 13, 14, 15, 24 and 26. One specific issue regards whether said senatorial district committees should include members from the legislative districts. This question has been answered for senatorial district No. 2 (Attorney General's Opinion Letter No. 131); but clarification is requested for the rest of the senatorial districts in St. Louis County and St. Louis City.

As you have noted, your question is answered in our Opinion No. 131, dated June 23, 1978, to Dames, copy enclosed. In that opinion we concluded that the second senatorial district is governed by both the provisions of subsections 2 and 4 of § 115.619, RSMo.

We understand that the other senatorial districts, 1, 7, 13, 14, 15, 24 and 26 do not contain an entire county, and therefore subsection 2 of § 115.619 does not apply. Such senatorial districts are composed, we understand, in whole of a part of a county (St. Louis County) (Districts 7, 13, 14, 15, 24 and 26) or are composed in part of a part of a city (St. Louis City) and part of a county (St. Louis County) (District 1). Therefore, the makeup of the Senatorial District Committees of Districts 1, 7, 13, 14, 15, 24 and 26 should be in accordance with the provisions of subsection 4 of § 115.619. We believe this answers your first question.

In answer to your second question, § 115.615, RSMo, refers to the organization of the county committee and provides in pertinent part:

At the meeting, each committee shall organize by electing one of its members as chairman and one of its members as vice chairman, a man and a woman, and a secretary and a treasurer, a man and

The Honorable Edwin L. Dirck

a woman, who may or may not be members of the committee. The county chairman and vice chairman so elected shall by virtue thereof become members of the party congressional, senatorial and judicial committees of the district of which their county is a part.

No entire county is a part of Districts 1, 7, 13, 14, 15, 24 or 26. The key here is the same as it is in interpreting subsection 2 of § 115.619, whether the entire county lies within the district. Obviously, an entire county does not lie within any of the districts mentioned other than the second district. Therefore, the chairman and vice chairman of the St. Louis County Democratic Central Committee are not members of Senatorial Districts 1, 2, 7, 13, 14, 15, 24 or 26.

In answer to your third question, if there is a conflict between a provision of the constitution of the Missouri State Democratic Party and a provision of state statutory law regarding the members of Senatorial District Committees of St. Louis County and St. Louis City, it is our view that the statutes would control. We have not been given information regarding the purported conflict. Therefore, we do not discuss this question in detail.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 131,
Dames, 6/23/78

September 25, 1980

OPINION LETTER NO. 198
(Answer by Letter-Klaffenbach)

The Honorable Paul Bradshaw
Senator, District 30
705 Woodruff Building
Springfield, Missouri 65805



Dear Senator Bradshaw:

This letter is in response to your question asking:

May a 'housing authority', created under provisions of RSMo §99.040, do business under a name that does not include the words 'the housing authority'? Specifically, may the housing authority of Springfield, Missouri do business as 'H.A.S. Properties' without violating RSMo §99.040?

Section 99.040, RSMo, to which you refer, provides in pertinent part:

1. In each city (as herein defined) and in each county of the state there is hereby created a municipal corporation to be known as 'the housing authority' of the city or county;

It is our view that the statute prescribes the name of such housing authority, and there is no legal authority that we are aware of which would authorize such a municipal corporation to adopt a name not consistent with such provisions.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

September 22, 1980

OPINION LETTER NO. 199
(Answered by letter-D. Dean)

Honorable James F. Antonio
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Antonio:

This letter is in response to your request for an official Attorney General opinion. I understand your questions to be as follows:

1. What will be the county classification on January 1, 1981, of Audrain, New Madrid, and Scott Counties, which had assessed valuations in excess of \$70,000,000 but not in excess of \$125,000,000, for the years 1974 through 1979?
2. What will be the county classification on January 1, 1981, of counties that have had assessed valuations in excess of \$70,000,000 but less than \$125,000,000 for the years 1975 through 1979 (i.e., Camden, Dunklin, Marion, Pike, Newton, Nodaway, Stoddard, and Randolph Counties)?
3. If the assessed valuation of a county which is now second class is below \$125,000,000 this year, has been below \$125,000,000 each year previously and is not likely to reach \$125,000,000 for many years in the future, will the county revert to being a third class county and, if so, when?

Honorable James F. Antonio

We note that, pursuant to Section 48.040, RSMo 1978, the State Auditor is required to ascertain if any county has changed classification, and, if so, to notify the appropriate elected county officials of such status change.

Section 8 of Article VI of the Constitution of Missouri provides that the counties of Missouri shall be organized and classified, and that: "the number of classes [of counties] shall not exceed four . . ." Sections 48.020 and 48.030, RSMo 1978, provided a basis for the organization and classification of Missouri counties into classes. The criteria for classification was the assessed valuation of the county, and the basic scheme was as follows: All counties with assessed valuations lower than \$10,000,000 were fourth class counties; counties which maintained assessed valuations of at least \$10,000,000 but less than \$70,000,000 for five consecutive years became third class counties; counties which maintained assessed valuations of at least \$70,000,000 but less than \$125,000,000 for five consecutive years became second class counties unless the citizens of the county voted to remain in the third class; counties which maintained assessed valuations of at least \$125,000,000 but less than \$300,000,000 for five consecutive years automatically became second class counties; counties which maintained assessed valuations of at least \$300,000,000 but less than \$400,000,000 for three consecutive years became first class counties unless the voters of the county elected to remain second class counties; and all counties which maintained assessed valuations of at least \$400,000,000 for three consecutive years automatically became first class counties. On December 29, 1978, the Missouri Supreme Court in Russell v. Callaway County, 575 S.W.2d 193 (Mo. banc 1978) held that this statutory scheme, which permitted Callaway County to elect to remain a third class county after maintaining an assessed valuation of between \$70,000,000 and \$125,000,000 for five years, was unconstitutional because it, in effect, created a fifth class of counties, which is prohibited by Section 8 of Article VI of the Constitution of Missouri.

Thereafter, the Missouri General Assembly repealed Sections 48.020 and 48.030, RSMo 1978, and in lieu thereof, enacted Sections 48.020 and 48.030, RSMo Supp. 1979. These new sections became effective on September 28, 1979. The new scheme eliminated the option counties had under the repealed sections to remain second or third class counties.

Honorable James F. Antonio

Under the new system, the counties were classified as follows: counties with assessed valuations lower than \$10,000,000 are fourth class counties; counties which maintain assessed valuations of at least \$10,000,000 and less than \$125,000,000 for five consecutive years become third class counties; counties which maintain an assessed valuation of at least \$125,000,000 but less than \$400,000,000 for five consecutive years become second class counties; and counties which maintain assessed valuations of \$400,000,000 and over for five consecutive years automatically become first class counties. We assume the constitutionality of Sections 48.020 and 48.030, RSMo Supp. 1979.

The Supreme Court of Missouri in the case of Gershman Investment Corporation v. Danforth, 517 S.W.2d 33, 35 (Mo. banc 1974) said:

[A]n Attorney General may not declare a statute unconstitutional. This power is reserved to the courts by the Constitution. (Emphasis the court's)

There are certain counties in Missouri which attained the classification of second class counties on January 1, 1979. Johnson, Lafayette and Saline Counties maintained assessed valuations of at least \$70,000,000 (but less than \$125,000,000) for a period of five consecutive years, and actually became second class counties on January 1, 1979. Thereafter, on September 28, 1979, the new statutory scheme went into effect, under which a county becomes a third class county if it maintains an assessed valuation of at least \$10,000,000 but less than \$125,000,000 for five consecutive years. Thus, if the assessed valuation of Lafayette, Johnson and Saline Counties is now less than \$125,000,000 and remains less than \$125,000,000 for five consecutive years, then each such county will become a third class county. In assuming the constitutionality of Sections 48.020 and 48.030, RSMo Supp. 1979, we interpret those statutes to be prospective in effect, so that counties which changed classification before those statutes became effective will retain the classification they acquired until they fulfill the requirements of the statute now in effect to change classifications again. The explicit provision of Section 48.030, RSMo Supp. 1979, is that:

Honorable James F. Antonio

After September 28, 1979, no county shall move from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of the county is such as to place it in the other class for five successive years. . . .

Camden, Dunklin, Marion, Pike, Newton, Nodaway, Stoddard, and Randolph Counties had assessed valuations of at least \$70,000,000 but less than \$125,000,000 for the years 1975, 1976, 1977 and 1978, and 1979. In other words, they maintained assessed valuations of between \$70,000,000 and \$125,000,000 for four consecutive years prior to the statutory change. In 1979, the law governing classification of counties changed, so that a county does not become a second class county until it has maintained an assessed valuation of at least \$125,000,000 for five consecutive years. These counties do not become second class counties under the old statutory scheme because they did not fulfill the requirements of the old statutory scheme before those statutes were repealed. These counties will not become second class counties unless and until they maintain assessed valuations of at least \$125,000,000 and less than \$400,000,000 for five consecutive years. Once again, the explicit provision of the statute now in effect is that no county will change classifications after September 28, 1979, "until the assessed valuation of the county is such as to place it in the other class for five successive years." Section 48.030, RSMo Supp. 1979.

Audrain, New Madrid and Scott Counties maintained assessed valuations in excess of \$70,000,000 but less than \$125,000,000 for the years 1974, 1975, 1976, 1977, 1978 and 1979. In other words, they maintained assessed valuations between \$70,000,000 and \$125,000,000 for five consecutive years prior to the effective date of the new classification statutes. However, the old statutory scheme, Section 48.030, RSMo 1978, provided that:

The change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the required number of successive years that the county possesses an assessed valuation placing it in another class. If a general election is held between the date of the certification and the end of

Honorable James F. Antonio

the current fiscal year, the change of classification shall not become effective until the beginning of the county fiscal year following the next succeeding general election. . . .

The date of classification change for these counties under those provisions was to have been January 1, 1981. Therefore, these counties have not yet become second class counties. Prior to the date that they were to have become second class counties, the requirements for becoming a second class county changed and those counties had not fulfilled the requirements now in effect for change in classification from third to second class county. If the old statute had provided that a county changed its classification immediately upon the expiration of the requisite five-year time period, then these counties would have become second class counties prior to September of 1979, the effective date of the new statutes. We assume the constitutionality of Section 48.030, RSMo Supp. 1979, and we reiterate that it provides that:

After September 28, 1979, no county shall move from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of the county is such as to place it in the other class for five successive years. . . .

On January 1, 1981, which is after September 28, 1979, none of these counties shall have had the assessed valuation now required such as to place it in the second class for five successive years. Audrain, New Madrid, and Scott Counties will remain third class counties on January 1, 1981, and will continue to be third class counties until they maintain assessed valuations of between \$125,000,000 and \$400,000,000 for five successive years.

Respectfully,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

November 20, 1980

OPINION LETTER NO. 201
(Answer by Letter-Schneider)

The Honorable Ralph Hedrick
Representative, District 116
314 North Main
Butler, Missouri 64730

FILED

201

Dear Representative Hedrick:

This letter is in response to your question asking:

Must a school district which school is closed pursuant to section 171.121 RSMo, pay for the cost of transporting all elementary school students and all high school students to other public schools?

Section 171.121 provides in part:

If any district in this state has an average daily attendance of less than fifteen pupils as shown by the records of the last previous school year, the state board of education, after investigation that convinces it that it would be to the best interests of all concerned, shall require the board to provide for the tuition and transportation of the pupils of the district to other public schools. (Emphasis added.)

The Honorable Ralph Hedrick

It is clear from the statute that a school district which is closed pursuant to § 171.121 is required to pay the cost of transporting all pupils of the district to other public schools.

The school district board of education may, however, designate to which schools the students will be provided transportation and tuition as previously discussed by this office in Opinion No. 81, Seay, October 20, 1955. A copy of this opinion is enclosed for your reference.

Based on the rationale of Opinion No. 81, it is clearly permissible for a school district to decide where the children of the closed district shall attend school. The student is entitled to free transportation and tuition only to the school provided by the board of education of the closed school district.

It is our view that a school district which is closed pursuant to § 171.121 is required to provide for the transportation and tuition of its pupils who attend the school in another district. However, the board of education of the home district may decide to which other district it will pay the tuition and transportation costs.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure

Att'y Gen. Op. No. 81,
Seay, 10/20/55

Attorney General of Missouri

JEFFERSON CITY

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(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

November 5, 1980

OPINION LETTER NO. 203
(Answer by Letter-Wieler)

The Honorable William J. Hannah
Prosecuting Attorney of St. Charles County
205 North Second Street
St. Charles, Missouri 63301

FILED

203

Dear Mr. Hannah:

This letter is issued in response to your question,
which reads as follows:

If a person sells their own used motor vehicle to another without first obtaining a safety inspection certificate, is that person in violation of Section 307.380 RSMo 1978 and therefore punishable under 307.390 RSMo 1978?

Section 307.380, RSMo 1978, in pertinent part, provides:

. . . at the seller's expense every vehicle of the type required to be inspected by section 307.350, whether new or used, shall immediately prior to sale be fully inspected regardless of any current certificate of inspection and approval, and an appropriate new certificate of inspection and approval, sticker, seal or other device shall be obtained.

Section 307.350 requires every motor vehicle which is annually registered in this state to be inspected under the motor vehicle safety inspection law. The only exception upon sale is set forth in subsection 2 of § 307.380, RSMo 1978, which allows the selling of a vehicle without a certificate of

The Honorable William J. Hannah
Page two

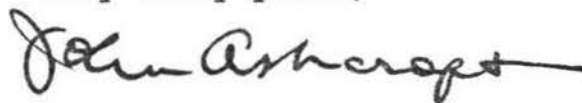
inspection and approval if the vehicle is sold for junk, salvage, or for rebuilding, or for vehicles sold at public auction or from dealer to dealer. In such cases, the purchaser is required under the statute to give the seller an affidavit on a form prescribed by the superintendent of the Missouri State Highway Patrol stating that the vehicle is being purchased for one of the reasons stated therein.

Unless the purchaser of a used motor vehicle acknowledges that the vehicle is being purchased for junk, salvage, or for rebuilding, the plain language of the statute requires the seller to obtain an inspection and the appropriate new certificate of inspection at the seller's expense prior to sale. Failure to do so could render the seller subject to the penalty provision of § 307.390, RSMo 1978, which states:

Any person who violates any provision
of sections 307.350 to 307.390 is guilty
of a misdemeanor and upon conviction shall
be punished as provided by law.

Therefore, unless sold for junk, salvage, or for rebuilding, which is acknowledged by the purchaser by affidavit on a form prescribed by the superintendent of the Missouri State Highway Patrol, the seller of a used motor vehicle must have that vehicle fully inspected and obtain the appropriate new certificate of inspection at the seller's expense immediately prior to the sale. Failure to do so may subject the seller to misdemeanor penalties upon conviction in accordance with § 307.390, RSMo 1978.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

October 2, 1980

OPINION LETTER NO. 204
(Answer by Letter-Klaffenbach)

The Honorable F. M. Wilson
Director, Department of Public Safety
621 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This letter is in response to your question asking whether the classes referred to in § 211.381, RSMo, are classes of counties or juvenile officer classifications.

Section 211.381 was a 1977 amendment to the laws of 1972. The 1972 laws referred to the same classifications. However, at that time § 211.381 expressly applied to only each county of the first class and the city of St. Louis. Therefore, it is obvious that in 1972, § 211.381 referred to classifications of juvenile officers and not counties.

When § 211.381 was amended in 1977, §§ 211.391 and 211.392, RSMo Supp. 1975, were repealed. Section 211.391 contained separate provisions for compensation for one juvenile officer, one chief deputy juvenile officer and deputy juvenile officers in counties of the second class and in those judicial circuits containing a county of the second class. Section 211.392 contained separate provisions for compensation for a juvenile officer, chief deputy juvenile officer, and deputy juvenile officers in judicial circuits comprised of counties of the third and fourth classes.

With this legislative background in mind, we believe that it is clear that the classifications referred to in § 211.381 are classifications of juvenile officer positions and not county classifications.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

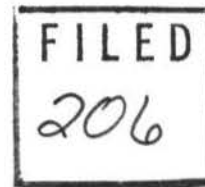
65102

(314) 751-3321

November 25, 1980

OPINION LETTER NO. 206

The Honorable Wayne Goode
Chairman, House Appropriations
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Goode:

This letter is in response to your question asking:

Your official opinion is requested to determine whether the language in Section 4.041 of House Bill 4, First Regular Session of the 80th General Assembly legally restricts the expenditures of the Branch Offices to \$1.00 per transaction; and, if so, whether any costs or functions of the Branch Offices may be excluded when figuring the cost per transaction?

You further state:

House Bill 4 of the First Regular Session of the 80th General Assembly, Section 4.041 states the following:

Section 4.041. To the Department of Revenue
For the Division of Motor Vehicle and Drivers
Licensing

For Personal Service, Equipment Purchase and
Repair and Operation expenditures for the
existing branch offices; this appropriation
is to be the sole source of funding
for the twelve offices on the basis of
One Dollar (\$1.00) per transaction and
any funds not required on this basis
shall elapse.

From State Highway Department Fund\$2,559,593

The Honorable Wayne Goode

The director of revenue maintains branch offices pursuant to § 32.040, RSMo.

It is our understanding that the present expenditures under § 4.041 exceed the one dollar basis figure. It is not clear whether the excess expenditure exists for each branch office or for all branch offices. However, in view of the result that we reach, such a determination is not relevant.

Your request involves the question of whether such legislation which descends to minute levels in an appropriation bill amounts to general legislation which cannot be passed in an appropriation act. It is our view that such provisions are in the nature of substantive legislation. In this respect we enclose our Opinion No. 207, April 19, 1974, to Young, which is self-explanatory.

We are therefore of the view that § 4.041 should not be given an interpretation which would restrict the expenditures for revenue branch offices to one dollar per transaction.

In view of our answer to your first question, an answer to your second question is not necessary.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 207,
Young, 4/19/74

October 20, 1980

OPINION LETTER NO. 207

The Honorable Melvin Smith
Representative, District 4
1502 South 17th Terrace
Bethany, Missouri 64424



Dear Mr. Smith:

This letter is in response to your request for an opinion asking as follows:

Do the provisions of section 79.220, RSMo, which grant to the mayor of a fourth class city the power to remit fines and grant pardons for violations of municipal ordinances conflict with section 479.020, RSMo, which made municipal courts divisions of the circuit court and municipal judges subject to the rules of the circuit court?

Section 79.220, RSMo, to which you refer, provides:

The mayor shall have power to remit fines and forfeitures, and to grant reprieves and pardons for offenses arising under the ordinances of the city; but this section shall not be so construed as to authorize the mayor to remit any costs which may have accrued to any officer of said city by reason of any prosecution under the laws or ordinances of such city.

It is clear that repeals by implication are not favored. Matter of Additional Magistrates for St. Louis County, 580 S.W. 2d 288 (Mo. 1979). Likewise, the power to grant reprieves and pardons is distinct from the power to sentence, and such powers are different in their origin and nature since the exercise of the power to grant reprieves and pardons is confided to the executive branch, whereas the exercise of the power to sentence is

The Honorable Melvin Smith

confided through the judicial department. Ex Parte Thornberry,
254 S.W. 1087 (Mo. Banc 1923).

Therefore, it is our view that the power granted the mayor under § 79.220 to remit fines and forfeitures and to grant reprieves and pardons for offenses arising under the ordinances of the city has not been affected by the constitutional or statutory changes in the operation and status of the municipal courts.

Very truly yours,

JOHN ASHCROFT
Attorney General

November 12, 1980

OPINION LETTER NO. 212
(Answer by Letter-Klaffenbach)

The Honorable Gary G. Sprick
Prosecuting Attorney
Howard County Courthouse
Fayette, Missouri 65248



Dear Mr. Sprick:

This letter is in response to your question asking:

Can a county hospital, organized under Sections 205.160, et seq., enter into a contract with a private physician for the operation of an out-patient clinic within the confines of the county hospital?

You also state:

The Board of Trustees of Keller Memorial Hospital, a county hospital organized under Sections 205.160, et. seq., wishes to know if they can enter into a contractual arrangement with a private physician for the operation of an out-patient clinic in the confines of the hospital. The hospital would provide the space, equipment, utilities, and supplies for operation of the clinic and would handle all accounting, billing and collection for professional services. The physician would provide medical services to patients seeking treatment in the clinic. The revenues derived from operation of the clinic would be divided between the hospital (25%) and the physician (75%). A copy of the proposed agreement is attached hereto in its entirety. (Exhibit 'A')

The Honorable Gary G. Sprick

It is our view that the question you pose comes within the conclusions we reached in Att'y Gen. Ops. Nos. 80 dated March 25, 1980, and 157 dated August 9, 1979, both of which were directed to you, as well as Opinion No. 224, dated August 20, 1968, to Graham, of which you have a copy.

We know of no authority for such an agreement. You have also advised us that the type of arrangement sought to be entered into is presently undertaken in several communities throughout Missouri. We do not believe that such agreements are authorized by Missouri law. However, you may wish to seek a declaratory judgment to obtain a court ruling regarding this question or to seek appropriate legislation.

Very truly yours,

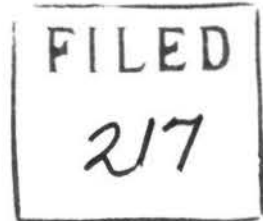
JOHN ASHCROFT
Attorney General

CIRCUIT JUDGES: An associate circuit judge of the probate division of the circuit court who was a probate judge on January 2, 1979, does not become a circuit judge of the probate division in a county of the second class which first attains a population of over 65,000 inhabitants under the 1980 official Census.

October 23, 1980

OPINION NO. 217

The Honorable Wesley A. Miller
Representative, District 121
801 East First Street
Washington, Missouri 63090



Dear Mr. Miller:

This opinion is in response to your question asking:

Shall an Associate Circuit Judge of the Probate Division of the Circuit Court, who was a Probate Judge on January 1, 1979, become a Circuit Judge of the Probate Division in 1981 in a county of the second class with a 1980 official Federal Census count of over 65,000 inhabitants.

You also state:

The official 1970 Federal Census of Franklin County, a second class county, was 54,452 inhabitants. The preliminary figures for the 1980 Census submitted to county officials was in excess of 69,000 inhabitants and additional upward adjustments may be made.

The Judge of the Probate Division of the Circuit Court was elected to the office of Probate Judge of Franklin County in 1970, 1974 and 1978. He took office on January 1, 1979, as a Probate Judge for a 4-year term. On January 2, 1979, under the new Judicial Article V of the Constitution of Missouri, he became an Associate Circuit Judge of the Probate Division.

The only provisions we find relative to the question you ask are located in § 27 of Article V of the Missouri Constitution.

The Honorable Wesley A. Miller

Section 27.3 of Article V provides in pertinent part:

. . . Until otherwise provided by law, associate circuit judges shall hear all cases or matters as now provided by law for probate courts within the county, except that in the city of St. Louis, in all first class counties, and all second class counties with a population of over sixty-five thousand, the circuit judge of the probate division of the circuit court shall hear all cases and matters as now provided by law for probate courts within such circuits or counties. . . .

Section 27.4a provides in pertinent part:

. . . On the effective date of this article the probate judge of the city of St. Louis and the probate judges of all first class counties and all second class counties with a population of over sixty-five thousand shall become circuit judges of their respective circuits and thereafter shall be selected or elected from the circuit as in the case of other circuit judges and be entitled to the same compensation as provided by law for circuit judges at the time of the effective date of this article until changed by law, and shall have the same powers and jurisdiction as judges of the circuit court. . . . On the effective date of this article the probate judges of counties with a population of sixty-five thousand or less shall become associate circuit judges of their respective circuits and thereafter shall be selected or elected from the county as in the case of other associate circuit judges and shall be entitled to the same compensation as that to which they were entitled on the effective date of this article until changed by law.

The Honorable Wesley A. Miller

Section 27.9 provides in pertinent part:

. . . The judges of the probate courts of the city of St. Louis and all first class counties, and all second class counties with a population of over sixty-five thousand, when such courts cease to exist, and the judges of the St. Louis court of criminal corrections, shall become circuit judges and receive the compensation payable to circuit judges.

The compensation of associate circuit judges is now provided in § 478.018, RSMo Supp. 1979. The salary schedule which is provided under § 478.018 is divided into categories according to county classification with an additional category for cities of more than 600,000 inhabitants and makes no distinction between former magistrate and probate offices. Prior §§ 478.015, 478.016, 478.021 and 478.022 were repealed at the time that § 478.018 was enacted effective July 1, 1980.

It is our view that the provisions which we have quoted from § 27.4a above applied only on the effective date of the judicial article, January 2, 1979. It is further our view that the provisions which we have quoted above from § 27.9 applied only when such courts ceased to exist, January 2, 1979.

The provision which we have quoted from § 27.3 relative to the jurisdiction of the circuit judge of the probate division of the circuit court in a second class county with a population of over 65,000 creates some ambiguity because we find no provision in the constitution or in the statutes which authorizes the associate circuit judge of a second class county having a population of over 65,000 to automatically become the circuit judge of the probate division of such a county at any time other than on the effective date of the judicial article, January 2, 1979. We therefore assume that such jurisdictional provision was intended to apply to the probate judge offices which became circuit judge offices under the provisions of § 27.4 and 27.9.

We therefore conclude that there is no provision in either the constitution or the statutes which would authorize an associate circuit judge of the probate division in a county of the

The Honorable Wesley A. Miller

second class which first attains a population in excess of 65,000 under the 1980 Decennial Census to automatically become a circuit judge. We understand that this interpretation is consistent with that given such sections by individuals who were instrumental in the drafting of the judicial article.

It is our understanding that arguments have been raised concerning the constitutionality of any interpretation which would preclude the provisions which we have quoted from automatically applying to associate circuit judges of the probate division in second class counties first attaining a population of over 65,000 after January 2, 1979. It is our view, however, with respect to such contentions that there is no clear constitutional impediment to the interpretation we have given such provisions. Thus, whether such constitutional objections are valid, we believe, should be left to judicial decision. Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo. 1974).

CONCLUSION

It is the opinion of this office that an associate circuit judge of the probate division of the circuit court who was a probate judge on January 2, 1979, does not become a circuit judge of the probate division in a county of the second class which first attains a population of over 65,000 inhabitants under the 1980 official Census.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

October 17, 1980

OPINION LETTER NO. 221
(Answer by Letter-Burns)

The Honorable Fred B. Brummel
1124 Hoyt Drive
Bellefontaine Neighbors, Missouri 63137

Dear Mr. Brummel:

We enclose a copy of Opinion No. 491, rendered November 19, 1970, to Representative Harold F. Reisch, which answers the question contained in your recent opinion request.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure
Att'y Gen. Op. No. 491,
Reisch, 11/19/70

October 23, 1980

OPINION LETTER NO. 222
(Answer by Letter-Burns)

The Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County Courthouse
Maysville, Missouri 64469



Dear Mr. Paden:

We enclose Opinion Letter No. 63, rendered March 16, 1976, to Representative W. O. Howard, together with the enclosure thereto, Opinion No. 245, rendered June 23, 1966, to Representative George H. Pace.

We believe that Opinion Letter No. 63 answers the question contained in your recent opinion request.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures 2
Att'y Gen. Op. No. 63,
Howard, 3/16/76 w/enc.
Op. No. 245, Pace,
6/23/66

Attorney General of Missouri

JEFFERSON CITY

JOHN ASHCROFT
ATTORNEY GENERAL

65102

(314) 751-3321

December 16, 1980

OPINION LETTER NO. 242

The Honorable William A. Peterson
Prosecuting Attorney
Saline County Courthouse, Rm. 300
Marshall, Missouri 65340

FILED

242

Dear Mr. Peterson:

This letter is in response to your request for an opinion from this office concerning the question of whether the county budget law applies to the fund established by § 137.750.3, RSMo Supp. 1980, and whether such funds are subject to county revenue statutes relating to budgeting, encumbrances, warrants, etc.

You have also stated that Attorney General's Opinion No. 153, dated November 7, 1980, issued to Hoffert, seems to infer that the county court need not approve the expenditures of moneys collected pursuant to Senate Bill No. 679 of the 80th General Assembly. Senate Bill No. 679 is now found in §§ 137.715 to 137.725, RSMo Supp. 1980.

It is our view that the county budget law and other laws relating to encumbrances, warrants, etc., apply to the expenditure of funds which we discussed in Opinion No. 153.

It is also our view however that the county court must follow the approved reassessment plan. The county court must budget the funds necessary to carry out the approved plan, and if such funds are not actually budgeted by the county court, they are budgeted as a matter of law. State ex rel. Robb v. Poelker, 515 S.W.2d 577 (Mo.Banc 1974).

Very truly yours,



JOHN ASHCROFT
Attorney General